ONTARIO

Province of Ontario

REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON SECURITIES LEGISLATION IN ONTARIO

March 1965

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Report of the Attorney General's Committee on Securities Legislation in Ontario

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March 1965

THE HONOURABLE A. A. WISHART, Q.C.

The Attorney General of Ontario

SIR, We have the honour to present to you the Report of your Committee on Securities Legislation.

"J. R. KIMBER"

Chairman

"W. B. COMMON"

"R. A. DAVIES"

"C. W. GOLDRING"

"T. A. M. HUTCHISON"

"H. I. MACDONALD"

"H. C. F. MOCKRIDGE"

"J. S. YOERGER"

"H. L. BECK"

Secretary

"H. P. CRAWFORD"

Secretary

"M. L. FRIEDLAND"

Legal Associate

TORONTO, MARCH 11, 1965.

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PART I

INTRODUCTION

1.01 In October 1963, the then Attorney General of Ontario appointed a Committee on Securities Legislation with the following terms of reference:

> "To review and report upon, in the light of modern business conditions and practices, the provisions and working of securities legislation in Ontario and in particular to consider the problems of take-over bids and of "insider" trading, the degree of disclosure of information to shareholders, the requirements as to proxy solicitation, procedures as to primary distribution of securities to the public and like matters, and generally to recommend what, if any, changes in the law are desirable."

1.02 The membership of the Committee consisted of Mr. J. R. Kimber, Q.C., as Chairman, together with Mr. W. B. Common, Q.C., Mr. R. A. Davies, Q.C., Lieutenant-General H. D. Graham, Q.C., and Mr. H. C. F. Mockridge, Q.C. Subsequently, General Graham asked to be relieved of his position, owing to other commitments. Following the appointment of the original Committee it became evident that the scope of the study was more extensive than originally contemplated and the Committee was therefore enlarged in January, 1964 by the appointment of Mr. C. W. Goldring, Mr. T. A. M. Hutchison, F.C.A., Professor H. I. Macdonald and Mr. J. S. Yoerger, Q.C., as members of the Committee.

1.03 Mr. H. L. Beck and Mr. H. P. Crawford were appointed joint Secretaries to the Committee, and Professor M. L. Friedland, of Osgoode Hall Law School, was appointed Legal Associate to the Committee. All three have taken an active and full part in the discussions of the Committee and have been helpful in assisting it to reach its conclusions.

1.04 Following its formation, the Committee embarked upon an extensive review of the laws applying to securities in Ontario and the other provinces of Canada. Although the practice in Canada was of primary concern, the laws of other jurisdictions, in particular those of the United Kingdom and the United States, were considered. This review disclosed that Ontario was not alone in engaging in a study of corporation and securities laws. In the United States, the Securities and Exchange Commission ("S.E.C.") has completed a major study which has resulted in new legislation. The Commonwealth of Australia has recently enacted legislation on many of the matters within our terms of reference. The Republic of South Africa is engaged in a study of securities legislation. In Canada, the Province of Manitoba carried out a study which resulted in the enactment of a new Companies Act. Similarly, a Bill has been introduced in the Parliament of Canada which, if enacted, will result in major revisions to the Companies Act (Canada). In England, an extensive study of company law and securities legislation was recently conducted by the Company Law Committee,[1] under the chairmanship of The Right Honourable Lord Jenkins. Although the Jenkins Report has not yet been implemented, it has received wide support throughout the business and financial community.

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1. Report of the Company Law Committee, 1962, (The Jenkins Report).

1.05 The securities industry is a central feature of the capital market in an advanced economy. The extensive reviews of securities legislation in recent years are a consequence of the growing awareness of the importance of the role of the securities industry and a recognition that the increasing flow of capital among various jurisdictions requires greater uniformity of law and practice. Capital investors, both domestic and foreign, are demanding more adequate information as well as greater protection.

1.06 While the underlying purpose of legislation governing the practices and operation of the securities market must be the protection of the investing public, it is equally true that the character of securities legislation will affect the development of financial institutions and their efficiency in performing certain economic functions. The principal economic functions of a capital market are to assure the optimum allocation of financial resources in the economy, to permit maximum mobility and transferability of those resources, and to provide facilities for a continuing valuation of financial assets.

1.07 Establishment of conditions and practices in the capital market which best serve the investing public will normally be consistent with the best interests of the whole economy. For example, disclosure of financial information which depicts adequately the operations and financial position of companies is vital to the investing public; such disclosure also provides the capital market with the information necessary to make a more satisfactory allocation of resources.

1.08 A difficulty arises in the attempt to translate these broad economic objectives into feasible practices. Theoretically, the basic objective would be the maintenance of a completely free and open securities market, a market in which there is no interference with the securities transactions of individual, corporate or institutional members. This would assume the existence of a number of conditions such as perfect knowledge of the market and market opportunities on the part of both buyer and seller, free and direct access of buyer and seller to the market, complete mobility of financial resources in the market, and a determination on the part of buyers and sellers not to tolerate any interference with the market.

1.09 In practice, these conditions are not found; rather one finds imperfect knowledge, restraints to the free and direct access of all persons to the market, less than perfect mobility of financial resources for a variety of economic, legal, physical and institutional reasons, and tolerance of interference with the free operation of the market. Moreover, in practice it is difficult to organize the market so that it will always function in the best interests of the development of the economic resources of the country.

1.10 Securities legislation must be designed not only to serve the purpose of reducing the imperfections in the free and open capital market, but also to assure the efficient operation of the market in achieving long-run economic objectives. There is also an ever-present danger that in removing one imperfection, another may be created. For example, in a perfectly free and open market, the interests of the company and the shareholder would be parallel; in an imperfect market, the economic growth of a particular company may be better served through the concealment of certain practices from competitors, which concealment could be in the long-run interests of both the shareholder and the company. On the other hand, such

concealment may prejudice the position of the individual shareholder, who is then denied the information which he requires to evaluate his investment properly.

1.11 Essentially, the capital market consists of two closely inter-related components: the primary market for new capital to finance new economic activity and the secondary market for the re-sale and re-valuation of outstanding securities. One of the strongest single forces in the complex process of raising capital is public confidence. The decision to invest is undertaken largely out of public confidence in the potential of the economy; public confidence in turn is largely based on the expectation of profits and knowledge of relevant facts necessary to permit the anticipation of such profits. The secondary market and its principal instrument, the stock exchange, apart from its daily function of the valuation of assets, acts as a barometer of the state of the economy. In turn, the secondary market cannot perform this function unless individuals have confidence in it. Consequently, every possible means should be taken to enhance the reputation of the secondary market and to establish it as a mature, respectable institution of the capital market.

1.12 A mature secondary market will have the effect of creating public confidence in the primary market. Only through public confidence in the institutions of both markets will capital be readily raised to finance the vital economic developments of the nation. At all times, it must be made clear that the risks that are being evaluated by the capital market are normal business risks of success or failure, and every effort must be made to ensure that the public understands those risks. This is not to suggest that the public must be protected against itself; rather, it is a matter of ensuring that the investing public has the fullest possible knowledge to enable it to distinguish the different types of investment activity available. In such circumstances, the public would have reasonable assurance that its losses are genuine economic losses, just as its gains are genuine economic gains. Such assurance is the best possible guarantee of active Canadian participation in the financing of the economic development of Canada.

1.13 It is often argued that Canadians are reluctant to face the risks involved in investing in equity capital and that this has retarded our economic development and opened the door to foreign investment. While evidence on this contention is conflicting, it is indisputable that the rate of savings of Canadians is among the highest in the world. Whether an adequate part of these savings will be channelled into equity investments is dependent upon public confidence in the equity markets. Therefore, great care must be observed in ensuring that the equity markets function in the best interests of investors, and it follows that the greater the care taken in providing that assurance, the greater will be the resultant maturity of the markets.

1.14 While Canada enjoys one of the highest standards of living in the world, it is not yet one of the leading industrial nations. However, Canada is at that stage of economic growth where the importance of the development of mature secondary industry is now surpassing in importance the development of natural resources. A prime requirement to accelerate our movement along this road is for our capital markets to be unquestionable in their efficiency

and respectability. Such is the interest of all who are concerned for the economic future of the country and the province; such is the responsibility of those who are charged with considering securities legislation in the Province of Ontario.

1.15 The Committee was particularly anxious to profit from the advice and experience of those individuals and organizations who shared this concern. We were also determined to develop our recommendations with as full an awareness as possible of the practices and problems of the securities industry. Accordingly, as a result of public advertisement and direct solicitation, the Committee received briefs from various individuals and groups, including those most actively engaged in the securities industry. In order to explore a number of the issues raised by the briefs, the Committee held both public and private sessions with members of the securities industry and the general public. We have also profited from discussions and correspondence with officials of other jurisdictions. The Committee is greatly indebted to all of the individuals and associations who took the time and effort required to prepare and submit briefs and to appear before the Committee.[2]

1.16 The last major revision of The Securities Act of Ontario took place in 1947. Prior to that time, the Ontario legislation dealt largely with potential fraud in the sale of securities and provided for the licensing of persons engaged in the industry. The fundamental change made to the Act in 1947 was the addition of prospectus provisions to ensure that a member of the public buying securities in the course of primary distribution received, in the words of the Act, "full, true and plain disclosure" of all material facts relating to the security. Apart from the power to license persons engaged in the trading of securities, the present Securities Act confers scant authority to regulate the secondary market.[3] After the Committee had commenced the preparation of this Report in final form, The Toronto Stock Exchange announced changes in its by-laws and rulings related to certain topics within the Committee's terms of reference. These changes are applicable, of course, only to companies listed on The Toronto Stock Exchange and do not affect the recommendations set out in this Report.

1.17 The Committee believes that changes in securities legislation in the Province of Ontario should be devised in recognition of two basic propositions. To the extent that securities legislation is improved in the interest of investors, the securities industry will benefit from increased public confidence. To the extent that the industry becomes a more effective and efficient part of the economy, the general public will benefit. Both objectives will be met by raising the standards governing the industry to the level presently maintained by the responsible members of the securities industry and which should be maintained, as a requirement of law, in the public interest. In this context, the Committee points out that the substantial majority of its recommendations contained in this Report deal directly or indirectly with disclosure of information to investors, that is to say, with the factor of public confidence.

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2. A list of the briefs received by the Committee is shown in Appendix A. In addition to these briefs, many helpful letters and suggestions were received from various sources.

3. For the history of securities legislation in Canada, see Williamson, *Securities Regulation in Canada.*

PART II

INSIDER TRADING

Need for Legislation

2.01 In the securities industry, the phrase "insider trading" is generally used to denote purchases or sales of securities of a company effected by or on behalf of a person whose relationship to the company is such that he is likely to have access to relevant material information concerning the company not known to the general public. Although there is no statistical information available showing the volume of such trading, there is no doubt that it takes place. The question which the Committee considered was whether this trading is a matter of such concern to the investing public that rules to control it should be established. The Committee's conclusion, as developed in this Part, is that statutory rules are required in the public interest.

2.02 In our opinion, it is not improper for an insider to buy or sell securities in his own company. Indeed, it is generally accepted that it is beneficial to a company to have officers and directors purchase securities in the company as they thereby acquire a direct financial interest in the welfare of the company. It is impossible to justify the proposition that an investment so made can never be realized or liquidated merely because the investor is an insider. However, in our view it is improper for an insider to use confidential information acquired by him by virtue of his position as an insider to make profits by trading in the securities of his company. The ideal securities market should be a free and open market with the prices thereon based upon the fullest possible knowledge of all relevant facts among traders. Any factor which tends to destroy or put in question this concept lessens the confidence of the investing public in the market place and is, therefore, a matter of public concern.

2.03 While the existing law recognizes that in certain circumstances a director is not entitled to profit personally as the result of the use of inside information, such law is not, in our opinion, adequate to prevent or discourage all the potential abuses inherent to the position of special advantage enjoyed by the insider. We believe that the law should clearly provide that the use by insiders, for their own profit or advantage, of particular information known to them but not available to the general public is wrong and that the law should give appropriate remedies to those aggrieved by such misuse.

Two-Fold Remedy

2.04 The Committee has concluded that the legislation required to meet the problems should provide for full and public disclosure of all transactions effected by insiders in the securities of their companies. This is the primary requirement. The insider who knows that his trading will become public knowledge will be less likely to engage in improper trading. Such disclosure will also lead to greater investor confidence in the securities market. However, disclosure, while a deterrent, is not, in our view, sufficient by itself. The possibility that improper trading may occur requires that there be a sanction against those who engage in it. Consequently, the law should provide an effective procedure to recover any benefits derived

by those who engage in improper insider trading. The Committee therefore recommends the enactment of legislation to deal with both the reporting and liability aspects of insider trading, the recommended details of which are considered below. The specific proposals for introducing the legislation are set out in Paragraph 2.31.

Definition of an Insider

2.05 The Committee gave extensive consideration to the categories of persons to be included in the definition of insider. The definition must be sufficiently precise to give clear guidance to the business community, yet sufficiently flexible to prevent an insider from avoiding the intent of the legislation by artifice. While the scope of the definition should not be unnecessarily inclusive, we feel that a wide definition is preferable to a narrow one. This conclusion is based on the premise that the benefits which will be derived from reporting will be of prime importance. The fact that a person is an insider and therefore required to report does not *ipso facto* make his trading improper. In the view of the Committee, trading is improper and should be declared unlawful only if the insider does in fact abuse his position.

2.06 All directors should be deemed to be insiders of the company of which they are directors. Certain officers of a company should also be included in the definition of insider, but it is essential that the term "officer" be defined with care. The definition should be broad enough to encompass those members of management who have access to confidential information and take part in the formulation of corporate decisions, but narrow enough to exclude junior officers, whether or not they have access to such information. Trading by such junior officers entails different considerations. Senior management itself would have an interest in ensuring that these persons do not trade on the basis of confidential information. The policing of such activity may well be left to management.

2.07 Therefore the Committee recommends that those officers of companies who are to be categorized as insiders should be restricted to executive officers. The term "executive officers" should be defined, for the purpose of this Part, to mean the Chairman and any Vice-Chairman of the Board of Directors, the President, any Vice-President, the Secretary, the Treasurer, the General Manager and any other person performing functions similar to those of such officers, together with the five highest paid employees of the company, other than the foregoing, whose direct remuneration paid by the company or its subsidiaries is at a rate in excess of $20,000 per annum. This definition should enable management to determine without undue difficulty, in most cases, whether or not a particular officer or employee is to be treated as an insider of the company for the purpose of the proposed insider trading legislation.

2.08 The Committee considered the position of other employees who receive confidential information in the course of their employment, and who might use the information to their private advantage by trading in the securities of the company which employs them. While the use of such confidential information is improper, we do not recommend any legislative rules with respect to this trading. As with junior officers, the policing of any such abuse can be left to management.

2.09 A similar conclusion was reached in regard to professional persons, such as lawyers, accountants and financial agents. The improper use of confidential information by professional advisers cannot be condoned, but the disciplining of such persons, who abuse the confidence placed in them, must be left to the companies who retain them and the professional bodies to which they belong. The Committee is prepared to assume that the principles of the proposed legislation are at present or will be incorporated in the ethical codes of the bodies governing such professional advisers.

2.10 In addition to directors and specified officers and employees, another class of persons should be included in the category of insider. These are persons who, by reason of holding a substantial number of equity shares of a company, are likely to receive confidential information or likely to exercise an influence over management, or both. Substantial shareholders of companies, whether or not their shareholdings constitute legal control and whether or not they act through nominee directors and officers, should be classified as insiders and be subject to the terms of the proposed legislation. The substantial shareholder may technically be an "outsider" rather than an "insider" but by virtue of his relationship with the company he should be treated for these purposes as if he was in fact a member of management. In determining what percentage of the outstanding shares of a company held by a person would place such person in the position of being an insider, the Committee has concluded that it is necessary to take a figure which to some extent is arbitrary. In view of the lengthy, and apparently satisfactory, experience in the United States, the Committee recommends that the legislation in Ontario adopt the S.E.C. rule that any person who is, directly or indirectly, the beneficial owner of more than ten per cent of the outstanding securities of any class of equity securities of a company be deemed to be an insider of that company.[1] It may be noted that the Jenkins Report also selected ten per cent as the appropriate figure for this purpose.[2]

2.11 As the result of defining a shareholder as an insider in terms of the ownership of a specified percentage of outstanding securities, the definition would include an underwriter who, in the course of a primary distribution to the public, acquires, by reason only of such underwriting, ten per cent or more of the shares of a company. Underwriters by the nature of their business engage in the buying and selling of securities and there appears therefore to be no justification for such inclusion. We therefore recommend that, in determining whether an investment dealer or other underwriter is the owner of more than ten per cent of the equity securities of a company (and therefore an insider), there should be excluded from the computation any securities of such company acquired by him by reason only of an underwriting transaction in the course of a primary distribution of such securities to the public, provided that they are disposed of by him during the course of such primary distribution.

2.12 Persons not connected with the company, but connected in some manner with an insider, such as spouses, relatives, friends and business associates who receive confidential

1. Securities Exchange Act of 1934, s. 16.
2. Paras. 141 *et seq.*

information from the insider have also concerned the Committee. These persons have been described by some writers as "tippees". If it is wrong for the insider to use confidential corporate information for his own benefit, it is also wrong for him to give the information to "tippees" so that they may benefit. While appreciating this, we feel that it is impractical to require reporting in these circumstances.

2.13 Since the recommended basis of the requirement to report is, primarily, access to confidential information, provision should be made to require reporting by an insider of one company of his transactions in securities of companies of which the first mentioned company is an insider.

Reporting

2.14 Both The Corporations Act[3] and the Companies Act (Canada)[4] contain provisions which require a form of reporting applicable only to transactions by directors. These provisions have proved ineffectual in meeting the problems of insider trading. Disclosure, to be effective, must be made within a reasonably short period of time after the trading takes place and must be made to the public at large, not merely to the company or its shareholders at annual meetings.

2.15 The Jenkins Committee recommended that directors report their trading within seven days of any transaction. We believe that this short period places too heavy a burden on the insider and is not necessary. The S.E.C. rule requires reporting within ten days after the end of the month in which the transaction takes place.[5] This appears to the Committee to be a practical and fair provision, and we recommend that a similar rule be adopted in Ontario.

2.16 Adequate disclosure necessitates that the prescribed report state, in respect of each transaction during the period covered by the report, the number and class of securities traded, directly or indirectly, the purchase or sale price thereof and the date of such transaction.

2.17 The legislation should require the initial reporting of the existing security position of all insiders, within a specified period of time after such legislation becomes effective. Details of such security position should include the number and class of securities beneficially owned, directly or indirectly. Thereafter, every person who becomes an insider of a particular company should be required to report the securities he owns beneficially, directly or indirectly, in that company within ten days after the end of the month in which such status is acquired.

2.18 In the opinion of the Committee, the Ontario Securities Commission is the appropriate public body to receive these periodic reports, which should be open to public inspection at the office of the Commission. The S.E.C. publishes a monthly report of the insider trading information required to be filed with it. We recommend that this practice be followed by the Ontario Securities Commission.

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3. R.S.O. 1960, c. 71, s. 71.
4. R.S.C. 1952, c. 53, s. 98.
5. Securities Exchange Act of 1934, s. 16.

2.19 The reporting of insider trading should, in principle, be made applicable to all companies whose securities are traded among members of the public. Thus, private companies will be excluded.

Penalties for not Reporting

2.20 Coupled with the duty to report, there must be penalties for failing to report and for the making of untrue statements in a report. Penalties for breaches of the statute would be imposed by way of summary conviction proceedings. The Committee recommends, however, that there be an alternative procedure open to the Ontario Securities Commission in cases of non-compliance with the reporting provisions. The Commission should, in such cases, be empowered to apply to a judge of the Supreme Court of Ontario for a mandatory order to compel compliance with the legislation. This procedure would permit the development of interpretative case law in the civil courts unhampered by the strict rules of statutory interpretation applicable in criminal or quasi-criminal proceedings.

Action by Shareholder

2.21 The second aspect of the Committee's approach to the problems of insider trading is the suggested establishment of a procedure whereby any benefits received by an insider who has improperly traded in the securities of his company can be recovered. The person most directly injured by improper insider trading is the person who traded with the insider. The law should ensure that he has a cause of action.

2.22 In the English case of *Percival v. Wright*[6] it was held that no fiduciary relationship exists between a director of a company and its shareholders. The wide scope of this decision was qualified to a certain extent by the Privy Council in *Allen v. Hyatt*[7] where it was held that in certain special circumstances there is a fiduciary relationship. The extent to which *Allen v. Hyatt* qualifies *Percival v. Wright* is uncertain. It is probably limited to a very narrow class of case in which the shareholder and the director meet virtually face-to-face and the director is put in a fiduciary relationship by the conduct of the parties. Even if *Percival v. Wright* were judicially overruled with the result that directors would then owe a fiduciary duty to the shareholders of the company of which they are directors, the courts would be unlikely to impose such duty on insiders other than directors, such as officers or principal shareholders; nor is it likely that a fiduciary relationship would be established by jurisprudence to assist a purchaser of securities from an insider if such purchaser was not at that time a shareholder of the company. The Committee accordingly recommends that the so-called doctrine of *Percival v. Wright* be abolished by statutory enactment, to be replaced by legislative rules, outlined below, governing the legal relationship between insiders of a company and persons with whom they trade in the company's securities.

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6. [1902] 2 Ch. 421.
7. (1914) 17 D.L.R. 7.

2.23 The Jenkins Committee also recommended that the doctrine of *Percival v. Wright* be abolished. The Jenkins Report states:[8]

> "A director of a company who, in any transaction relating to the securities of his company or of any other company in the same group, makes improper use of a particular piece of confidential information which might be expected materially to affect the value of those securities, should be liable to compensate a person who suffers from his action in so doing unless that information was known to that person".

The Committee's conclusion, however, differs from that of the Jenkins Committee in that we recommend that liability should result from improper trading by all insiders, not that of directors alone.

2.24 When improper insider trading takes place, the other party to the transaction may suffer loss which he should be entitled to recover. The cause of action to be given to a shareholder by the suggested legislative rules could or would not be utilized in many cases. In the most common situation the shareholder would not know that he had a cause of action against the insider because he would not know the identity of the other party to the trade. This is particularly so if the transaction took place through a stock exchange because it is extremely difficult to trace transactions taking place on the floor of an exchange. Even if a shareholder were able to identify the transaction between himself and the insider, it is not likely that he would bring the action. The amount any individual shareholder would recover in a particular instance is not likely to be sufficient to induce the shareholder to become involved in an expensive lawsuit, particularly since, in our view, liability should only arise if wrong-doing or impropriety is established and not on an automatic basis as exists under section 16 (b) of the Securities Exchange Act of 1934.[9] While these impediments warrant the creation of a cause of action in favour of the company, the creation of the new cause of action should not deprive a shareholder of his personal cause of action against the insider.

Action by the Company

2.25 While we know of no actions brought either in England or Canada to compel a director to account to the company in cases of improper insider trading, it has been contended that the present law gives a right of recovery to the company. The decision of the House of Lords in *Regal (Hastings), Ltd. v. Gulliver*[10] and the decision of the Supreme Court of Canada in *Zwicker v. Stanbury*[11] could be cited in support of such contention. As Lord Porter states in the first mentioned decision:

> "... a director must not make a profit out of property acquired by reason of his relationship to the company of which he is director".

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8. Para. 99 (b).
9. Section 16 (b) makes an insider liable to account to the company for profits made on securities bought and resold or vice versa within a six months period. With some limited exceptions, the reason for the trading by the insider is not relevant.
10. [1942] 1 All E.R. 378.
11. [1953] 2 S.C.R. 438.

Professor L. C. B. Gower takes the position that directors would be liable to their company in these circumstances. He states in his well-known text:[12]

> "Directors are not permitted, either during or after their service with the company, to use for their own purposes anything entrusted to them for use on behalf of the company. This principle is not restricted to property in the strict sense; it also includes trade secrets and confidential information. This principle, it is submitted, should be wide enough to cover cases, such as *Percival v. Wright*, in which directors have used confidential information (for example, knowledge of an impending dividend declaration or take-over bid) to speculate successfully in their company's shares. The fact that the company itself suffers no damage ought, on general principles, to be irrelevant".

However, the Committee is of the view that there is sufficient uncertainty in the present state of the law to justify a recommendation that legislation should provide a specific cause of action in favour of the company against an insider who profits from improper trading in the securities of the company.

Bases of Actions

2.26 We have recommended above that a cause of action be provided by statute in certain instances both to a shareholder and the company if an insider improperly uses confidential information acquired by him in his position as an insider to trade in the securities of such company. Because these are new causes of action, it is advisable to state with some precision the bases for such causes of action. In this connection, Paragraph 2.23 sets out the course of conduct which the Jenkins Committee suggests is improper and which it recommends should form the basis of liability for insider trading by directors. The Committee has concluded that a comparable definition of improper insider trading, that is, trading which exposes the insider to legal liability, should be adopted by statute in Ontario. The Jenkins Committee's recommendation with respect to insider trading would give a cause of action only to a shareholder. In order to provide a cause of action both to the shareholder and to the company, as the Committee has recommended above, we advocate the establishment of a statutory liability in respect of unlawful insider trading substantially as follows:

> An insider of a company who, in any transaction relating to the securities of that company or of any company of which the first mentioned company is an insider, makes improper use of specific confidential information which might be expected materially to affect the value of those securities, shall be liable to compensate any person who directly suffers from his action in so doing unless that information was known or ought to have been known to such person, and shall also be accountable to the company for any direct benefit, received or receivable by him, resulting from any such transaction.

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12. *Modern Company Law* (2nd ed.), p. 495.

2.27 Depending on the circumstances, a company might not be willing to bring such an action against one of its directors or other insiders. The recommended cause of action in favour of the company may permit derivative actions by a shareholder suing on behalf of himself and all other shareholders of the company. In practice, however, because of the narrow class of cases in which shareholders are legally entitled to bring derivative actions, such actions are not likely to provide effective means of maintaining the recommended cause of action.

2.28 Section 16 (b) of the Securities Exchange Act of 1934 allows a shareholder to bring an action in the name of the company if the company fails to commence such action within 60 days after request. Since any amount recovered belongs to the company, the shareholder's benefit is indirect, so that the only effective means of ensuring that these actions are brought is for the courts to award generous costs to the plaintiff's attorney. This simplified derivative action has the result in the United States of inducing persons, usually lawyers, to cause these actions to be instituted for the purpose of obtaining legal fees. This is an unseemly procedure and is recognized as such by many people in the United States and we do not recommend its adoption in Ontario.

2.29 In order to provide the effective remedy which we feel is necessary, a governmental agency should have the right to bring the action if the company fails to do so within a reasonable time. The Ontario Securities Commission is the logical agency to assume this responsibility. The legislation recommended should provide that a shareholder who has reason to believe that a cause of action has arisen against an insider by reason of unlawful insider trading may, whether or not he is the person aggrieved, request the company by notice to maintain the cause of action which has, in the opinion of such shareholder, accrued to it by reason of such trading. If the company fails to commence action within a specified period of time, the shareholder should then be permitted to apply to a judge of the Supreme Court of Ontario, designated in a manner similar to that prescribed in section 74 of the Companies Act (Canada), for an order authorizing the Ontario Securities Commission to institute the action. On the application for the order the company and the Commission should be entitled to appear and be heard. The order would be made on such terms as to security for costs and otherwise as the Court sees fit and should authorize and require production of the company's books and records so as to permit the Commission to maintain the action.

DOUBLE LIABILITY

2.30 In view of the novelty in Ontario law of the legal principles underlying the recommended causes of action, the Committee recommends that the legislation be drafted so as to avoid double liability on insiders in respect of particular transactions involving improper insider trading.

PROCEDURE FOR ADOPTING RECOMMENDATIONS

2.31 The Committee, in conclusion, advocates the following specific means of introducing into Ontario law its recommendations set out above concerning insider trading.

(a) Appropriate amendments embodying such recommendations should be made to The Corporations Act.

(b) The Ontario Securities Commission should be empowered, by amendments to The Securities Act, to require written undertakings from companies, wherever incorporated, at the time of filing under the Act prospectuses relating to the sale of securities in Ontario, to comply or to cause compliance with the Committee's recommendations herein as to insider trading, with the effect that:

(i) in the case of companies which have sold in Ontario (directly or through underwriters) by means of such prospectuses, shares or obligations convertible into shares, such companies shall, so long as any of the shares or obligations are outstanding, or until released by the Ontario Securities Commission from such undertakings, require the directors and executive officers (as defined above) of such companies to comply with the provisions of The Corporations Act (as to be amended) with respect to insider trading; in this connection, companies should be required, pursuant to the terms of their undertakings, to obtain and file with the Commission undertakings from those persons who are directors or executive officers of the company at the time of filing such prospectuses and those who thereafter become directors or executive officers of the company to comply with the recommended provisions with respect to insider trading; and

(ii) such companies shall, so long as any of the shares or obligations are outstanding, or until released by the Ontario Securities Commission from such undertakings, be and remain subject to the provisions of The Corporations Act (as to be amended) with respect to insider trading.

(c) The Securities Act should be amended to require The Toronto Stock Exchange to compel companies listed thereon to comply, in appropriate cases, with the provisions of The Corporations Act (as to be amended) with respect to insider trading.

(d) The Securities Act should be amended to require insiders (as defined above) of the companies referred to in sub-paragraphs (b) and (c) to comply with the provisions of The Corporations Act (as to be amended) with respect to insider trading.

(e) The Securities Act should be amended to provide that, in the event of the failure of a company to comply with the provisions of The Corporations Act (as to be amended) with respect to insider trading or the failure of a company to observe any undertaking given in accordance with the provisions of sub-paragraph (b) hereof, the Ontario Securities Commission in its discretion may refuse to accept for filing a prospectus of any such company.

Insider Trading and Take-Over Bids

2.32 The investing public has in the past indicated concern with trading which has been alleged to occur in another situation, namely, the trading of shares in anticipation of the

announcement of a take-over bid by persons who have knowledge that the bid is to be made. If this trading is done by insiders of either company involved, in shares of their own company, the trading would be subject to the recommended legislation. Trading by the insiders of either company in shares of the other, however, would not be subject to such legislation. Such trading is dealt with in Part III of this Report.

PART III

TAKE-OVER BIDS

Need For Legislation

3.01 There has been, in the past several years, criticism by the general public, the financial community and the press concerning both the form and effect of numerous commercial transactions whereby a company or a bidding group has sought to acquire legal or effective control of another company by a procedure which has come to be known as a "take-over bid".

3.02 The take-over bid transaction is to be distinguished from other types of transactions whereby two or more companies combine their business operations by way of, say, a statutory amalgamation or by way of asset acquisition. These latter transactions do not seem to require any particular legislative reform.

3.03 It has not been suggested to the Committee, nor is the Committee of the view, that the take-over bid is inherently harmful either to the general public, to the shareholders of the companies involved, or to the economy of the province or the country as a whole. On the contrary, the Committee recognizes that take-over bids can, in many cases, have positive advantages to the companies involved, to their shareholders and to the economy generally. The Committee, further, is mindful of the fact that the existing structure of the financial community in Ontario and in Canada at large differs from that of other jurisdictions, such as the United Kingdom. While the legislation and studies in other jurisdictions have been examined by the Committee, we have remained cognizant of the fact that any recommendations which we make should relate to the commercial and financial circumstances which prevail in Canada and not elsewhere. For example, the Committee is aware that a significant number of the take-over bids carried out in the United Kingdom since the end of World War II were in part a consequence of the special business problems caused by circumstances peculiar to that country. The Committee has also noted with interest that while the take-over bid appears to be a common device employed in the United Kingdom, it is less frequently used in the United States. Therefore, in putting forward the recommendations which follow, the Committee has been guided primarily by domestic factors.

3.04 In 1959 a group of responsible and influential associations in the United Kingdom (including the Stock Exchange, London) issued a document entitled "Notes on Amalgamations of British Businesses". In 1963 this document was revised under the title "Revised Notes on Company Amalgamations and Mergers". The intention of those responsible for the preparation of these two documents was, primarily, to formulate a code to regulate, on a voluntary basis, the form and legal mechanics of the take-over bid. The existing legislation in the United Kingdom with respect to take-over bids is contained in the Licenced Dealers Rules issued by the Board of Trade pursuant to the power conferred on that body by section 7 of the Prevention of Fraud (Investments) Act, 1958. The Jenkins Report contains an important section on take-over bids which includes significant recommendations for amending the Licenced Dealers Rules and their method of application.

3.05 No special legislation with respect to take-over bids, as such, exists in the United States. There appear to be three reasons for this absence of special legislation: first, a take-over bid which takes the form of a share exchange offer is subject to the elaborate registration statement and prospectus requirements of the Securities Act of 1933; secondly, section 10 (b) of the Securities Exchange Act of 1934 and the rules promulgated thereunder have been held to be applicable to the take-over bid type of transaction;[1] and, thirdly, the disclosure requirements of the United States federal securities legislation and, in particular, the provisions requiring disclosure of security transactions by directors, officers and substantial shareholders of corporations subject to such legislation have prevented the vexing question of insider trading (so closely related to Canadian criticism of take-over bids) from becoming a controversial issue.[2]

3.06 In Canada, as in the United Kingdom, the necessity of regulating take-over bids was recognized by a responsible and influential group of associations who prepared and issued in 1963 "A Recommended Code of Procedure to be applied in connection with Take-over Bids".[3] The rules of conduct and procedure recommended by this Code have been carefully studied by, and have been of substantial benefit to, the Committee. This voluntary Code appears not to have been followed in many cases and therefore in order to achieve full disclosure on an equitable basis, the Committee recommends that it be supplanted by legislative measures applicable, to the extent permitted by constitutional limitations, to all take-over bid transactions made or carried out in Ontario.

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1. See section 10(b) of the Securities Exchange Act of 1934 and Rule 10 b-5 thereunder. Section 10(b) makes it unlawful to use or employ, in connection with the purchase or sale of any security, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 10 b-5 states, that it is unlawful "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . .". The American courts have held that under certain circumstances concealment of material facts which would significantly affect the seller's evaluation of the offer may involve a violation of Rule 10 b-5. Take-over bidders who engage in deceptive practices may be subjected not only to enforcement action by the Commission but to civil liability to shareholders who suffer damage as a result of their acceptance of the offer. Rule 10 b-5 thus provides a significant restraint on improper practices in take-over bids, although the extent of its requirements in these situations has not been fully developed by the courts and, in particular, the extent of the disclosure which is called for is still not entirely clear.
2. In a letter dated May 27, 1964 from Mr. Manuel F. Cohen, then a Commissioner and now the Chairman of the Securities and Exchange Commission, to the Chairman of this Committee, Mr. Cohen states: "While take-over bids are by no means unknown in the United States and, in fact, occur with considerable frequency, they do not appear to have been the subject of the same degree of concern here as they have been, for example, in England. I do not know precisely why this is true. I suspect, however, that the system of disclosure prevailing here may have something to do with it. In combination, the reporting and proxy solicitation requirements of the Securities Exchange Act, the disclosure policies of the exchanges, particularly the New York Stock Exchange, and the developing corporate practice in the area of stockholder and investor information produce a substantial amount of current information about the more important companies. It is therefore somewhat more difficult for an unscrupulous bidder to impose upon an uninformed body of shareholders".
3. This Code was prepared after consultation among members of the Executive Committees of the Trust Companies Association of Canada, the Investment Dealers' Association of Canada, The Toronto Stock Exchange, the Montreal Stock Exchange, the Vancouver Stock Exchange and the Canadian Stock Exchange.

3.07 No legislation exists in Ontario to ensure that the rights and interests of the various parties involved in a take-over bid are adequately protected. The Committee was not appointed to perform a fact-finding function in the sense of seeking evidence as to the wrongs or harms which the shareholding public may have suffered as a result of the absence of statutory regulation of the take-over bid transaction. The Committee's recommendations concerning the adoption of a mandatory statutory code pertaining to take-over bids are made on an analytical basis designed to protect the general public by averting potential abuses while impeding as little as possible the use of the take-over bid technique.

Insider Trading and Take-Over Bids

3.08 Perhaps the most controversial feature of take-over bid transactions in recent years has been centered on the allegations made in the press and elsewhere that such transactions have led to "insider trading" profits, benefiting directors and other insiders. Certain aspects of insider trading dealt with in Part II of this Report apply to take-over bid transactions. The insider trading rules will require the disclosure of the trading by insiders of the offeror and the offeree company in the shares of their respective companies. Other aspects are dealt with by the Committee's recommendations as to the contents of take-over bid circulars provided for in Appendix B which will require, in certain circumstances, the disclosure of the holdings of the insiders of one company in the securities of the other company.

Definition of a Take-Over Bid

3.09 The most difficult single question considered by the Committee in its study of take-over bids has been the formulation of a definition of that type of transaction to which any recommended procedural or substantive rules should apply. The Licenced Dealers Rules define a take-over bid as "an offer to acquire securities of a corporation made to more than one holder of those securities calculated to result in any person acquiring, or becoming entitled to acquire, control of that corporation . . .". The Rules define "control" as meaning "control direct or indirect, or by means of any right, over the exercise of a majority of the voting power at meetings of the corporation excluding the voting power of holders of classes of securities . . ." having only limited voting rights. The Jenkins Report does not recommend that this definition be changed.

3.10 The Committee has concluded that the primary objective of any recommendations for legislation with respect to the take-over bid transaction should be the protection of the bona fide interests of the shareholders of the offeree company. Shareholders should have made available to them, as a matter of law, sufficient up-to-date relevant information to permit them to come to a reasoned decision as to the desirability of accepting a bid for their shares. In arriving at its conclusions, however, the Committee attempted to ensure that its recommendations would not unduly impede potential bidders or put them in a commercially disadvantageous position vis-à-vis an entrenched and possibly hostile board of directors of an offeree company.

3.11 In view of the conclusion reached by the Committee as to the proper objectives of legislation concerning take-over bids, the Committee does not think it desirable to define a

take-over bid in terms of attempted acquisition of either legal or effective control of a corporation. To define a take-over bid in terms of the intended acquisition of legal control would leave free from regulation a substantial number of offers where the objective is to acquire effective, not legal, control. The point at which effective control is achieved may vary widely from one case to another. As a result, we have concluded that for the purposes of the recommendations which follow, a take-over bid should be defined as an offer (other than by way of private agreement or by way of purchase on a stock exchange or in the over-the-counter market) made to any number of the holders of any class of outstanding voting shares of a company, other than a private company, to purchase a number of such shares which, together with the number of such shares beneficially owned, directly or indirectly, by the offeror and any person or company associated with the offeror at the time of making such offer, will amount in the aggregate to more than 20 per cent of the outstanding voting shares of such class. Provision should be made in any enabling legislation to exempt, by order of a judge of the Supreme Court of Ontario, particular transactions from the necessity of complying with the statutory code such as, in appropriate cases, an offer made to a limited number of shareholders of a public company. We suggest that such exemptions be effected by way of application made to a judge designated in a manner similar to that prescribed in section 74 of the Companies Act (Canada) and that notice of any such application should be given to the Ontario Securities Commission, which should have the right to appear and be heard.

Sale of Control

3.12 It follows from the suggested definition of a take-over bid that the Committee's recommendations for a statutory code will not relate to the acquisition or intended acquisition, by way of private agreement, of blocks of shares which represent legal or effective control. The Committee recognizes that, as a result, its recommendations will not embrace situations where control of a public company changes hands under circumstances in which the general body of shareholders is not afforded the same opportunity to dispose of their shares (at a possible premium over market) as is enjoyed by a control group. We are of the opinion that the evolution of a legal doctrine which may impose upon directors or other insiders of a company who constitute a control group a fiduciary duty toward other shareholders of such company in cases of change of control is, apart from insider trading aspects, a matter to be left to development by the judicial process.

Necessity to Submit Bid to Offeree Company

3.13 The Licenced Dealers Rules of the United Kingdom Board of Trade provide that the terms of a take-over bid must be delivered to the offeree company not less than three clear business days prior to the date on which the document containing the offer is despatched to the offerees. The Jenkins Report does not suggest any modification of this requirement. This approach seems to ignore the fact that the offer is being made to the shareholders of the offeree company for shares which are their personal property and that legally it does not affect the offeree company. While in the majority of cases the interests of all parties con-

cerned would best be served by an initial approach to the directors of the offeree company, there are many instances when an approach by a bidder to the directors of an offeree company or to a control group would hinder the success of a potential bid which might well be advantageous to the general body of shareholders of the offeree company and indeed, in some cases, would virtually ensure its failure. As a result, we do not recommend the adoption of a rule requiring a take-over bid to be submitted first to the directors of the offeree company.

Time Limits

3.14 The Committee considers it essential that management of the offeree company have ample opportunity to inform the shareholders of the offeree company of its analysis of any take-over bid. A take-over bid should therefore specifically provide that shares deposited pursuant thereto may not be taken up and paid for by the offeror until the expiration of seven days following the making of the offer. Certificates for shares which are in fact deposited within such period may, therefore, be withdrawn within such period at the option of the depositors.

3.15 On the premise that the principal purpose justifying the statutory code regulating take-over bids is to ensure that the shareholders of the offeree company are given adequate relevant information and a reasonable period of time within which to assess such information, we recommend that all take-over bids should be required to be left outstanding for a specified minimum period of time. For this reason, a take-over bid, whether on a cash or a share exchange basis, should, by its terms, remain open for a minimum period of 14 days following the initial period of seven days referred to above, making a total minimum period of 21 days. There will, of course, be circumstances in which the offeror wishes to leave his offer outstanding for a period of time in excess of the prescribed minimum. In cases of bids for less than all the outstanding shares of a particular class, the offeror should be prohibited from taking up and paying for shares which have been deposited under the offer until the expiry of the 21-day period or such longer period, not exceeding in all 35 days from the making of the offer, during which shares may be deposited under the offer, as may be specified in the original offer or any extension thereof. Immediately thereafter, assuming the other terms and conditions of the offer have been complied with, shares theretofore deposited must be taken up and paid for. If the number of shares so deposited exceeds the number specified in the offer, acceptances must be on a pro rata rather than a first-come first-served basis, unless the offeror elects to take up and pay for all deposited shares. In cases of bids for all the outstanding shares of a particular class the offeror may take up and pay for all shares deposited under the offer at any time or times subsequent to the initial period of seven days.

3.16 These recommended successive minimum time limits of 7 and 14 days will ensure that the shareholders of the offeree company are afforded an adequate opportunity to form a reasoned judgment as to whether or not they should sell their shares, without working a hardship on bidders by unreasonably exposing them to counter bids whether from management or others. The time periods should also ensure that management of the offeree company has sufficient opportunity to circularize shareholders of the offeree company recommending their acceptance or rejection of the bid as management sees fit. Further, the

suggested procedure will not prevent an offeror from leaving open his bid long enough to permit compliance with statutory provisions such as section 128 of the Companies Act (Canada) and the comparable provisions of various provincial companies Acts, while at the same time protecting depositing shareholders against having their shares tied up for extensive periods of time without payment.

Pro Rata Acceptance

3.17 A main feature of the procedural recommendations outlined in the preceding paragraphs is the elimination of the first-come first-served take-over bid. It can be argued that this recommendation may discourage potential bidders from making offers which might otherwise be made to the possible advantage of shareholders of offeree companies. On balance, however, the Committee believes that the potential inequities which can result from an offer made on a first-come first-served basis justify its elimination.

Identity of Bidder

3.18 The Committee has considered whether a bidder should be required in every case to disclose his identity. This question is, of course, only relevant to a cash basis take-over bid. We are of the opinion that, with respect to a cash basis take-over bid, the dominant factor which influences the offerees to accept is the adequacy of the price. Even though the identity of the bidder could influence the decision of a shareholder as to whether he wishes to sell his shares at the offered price or remain a shareholder of the company after acquisition of control by the bidder, the Committee believes that compulsory disclosure of the bidder's identity could discourage the making of bids which might otherwise be made.

3.19 The Committee recommends that the terms of any cash basis take-over bid should specifically state in adequate detail the arrangements that have been made to ensure that the required funds are available to take up and pay for the shares deposited under the offer if the bid is successful.

Lists of Shareholders

3.20 If a person who proposes to make a take-over bid in Ontario lacks the co-operation of the management of the offeree company, it is frequently difficult for him to obtain an up-to-date list of shareholders of the offeree company and therefore to place himself in a position to make the bid. Section 318 of The Corporations Act does not confer on any person the right to obtain a list of shareholders; it merely provides, in effect, that the register of shareholders is open to inspection by any shareholder of a company during normal business hours and that any shareholder may make extracts therefrom. Even in those cases where transfer agents maintain registers of shareholders in such a manner as to permit the making of extracts from the registers, the right conferred by section 318 is of dubious value. There are cases where transfer agents keep corporate share records by various modern systems which render the making of extracts from registers extremely difficult. As the trend towards

the installation of punch card and electronic devices as the means of maintaining registers of shareholders continues, the difficulty to which we refer will be accentuated.

3.21 The Committee therefore recommends that section 319 of The Corporations Act be amended to provide that on completion and filing with the company or its transfer agent of an affidavit in statutory form, comparable to that required by the present section, any person may require a public company or its transfer agent to furnish to such person, on payment of a reasonable charge, an up-to-date list of shareholders of the company. The amendment should provide that the list shall be furnished as soon as practicable and in any event not later than seven days from the date on which it is requested. The form of affidavit to be required should be worded in such a way as to ensure that the interests of the company and its shareholders are adequately protected against nuisance requests. The identity of the person on whose behalf the deponent is acting need not, however, be disclosed.

Variation of Offer Price

3.22 The Jenkins Report recommends that an offeror who, after making a take-over bid, subsequently varies the terms of his offer by increasing the price should be required to pay the higher price for shares accepted on the initial as well as the amended offer.[4] The Committee concurs with this view and recommends that an offeror who increases the price of his offer, whether on a cash or a share exchange basis, should be required to pay the increased consideration to accepting shareholders whether or not he has prior to the increase taken up and paid for shares deposited under the offer.

Information Accompanying a Take-Over Bid

3.23 In order to accomplish the stated objective of furnishing shareholders with sufficient information to permit them to assess the merits of any take-over bid, the Committee recommends that the offering document which constitutes the bid, whether on a cash or share exchange basis, must be accompanied by or form part of a take-over bid circular, the prescribed contents of which are set out in Appendix B.

3.24 The Committee considered whether the take-over bid circular should be reviewed by or filed with any governmental agency. The Committee recognizes that the issuance by a company of its own securities as part of a share exchange take-over bid does not differ in any essential constituent from the issuance of its securities in the course of primary distribution to the public. However, because of the importance of speed and secrecy to the success of a take-over bid or a counter bid and because the procedural and substantive recommendations which comprise the suggested statutory code for take-over bids should, on a logical basis, be applicable to both cash bids and share exchange bids, we recommend, as stated above, that a take-over bid circular should accompany or form part of every take-over bid and, further, that there be no requirement that the take-over bid circular be reviewed by or filed with the Ontario Securities Commission or any other governmental agency. The obliga-

4. Para. 294(e).

tion of ensuring compliance with the suggested statutory code will rest entirely on the bidder (or, in some cases on the directors of the offeree company).

Recommended Changes to The Securities Act

3.25 The Committee therefore recommends that The Securities Act be amended by adding thereto a new Part dealing exclusively with take-over bids. This Part would consist of four divisions:

Division A—General Provisions as to Take-over Bids
Division B—Contents of Take-over Bid Circulars
Division C—Additional Requirements for Share Exchange Take-over Bid Circulars
Division D—Contents of Directors' Circulars.

The recommended contents of these divisions are set out in Appendix B.

PART IV

DISCLOSURE IN FINANCIAL STATEMENTS

Importance of Disclosure

4.01 Disclosure of corporate information has been considered by the Committee in its broadest implications and also in its specific applications. Adequate disclosure was the purpose of securities legislation passed in England over 100 years ago. Subsequent securities laws in England, the United States and Canada have all endeavoured to promote, as one of their principal purposes, adequate disclosure of financial information to investors. It is evident from a survey of these laws that what was considered adequate disclosure at one given time has proven to be inadequate in a subsequent period. The Committee is of the opinion that the financial disclosure requirements of Ontario legislation should now be revised to meet the present needs of the investor in Ontario.

4.02 It is difficult for the ordinary investor, in the absence of adequate disclosure, to arrive at an informed opinion as to the worth of his investment. Disclosure, in itself, is not the complete answer to the problems faced by the investor. The ethical standards of directors and management of business corporations and of persons engaged in the securities industry are of great importance. The history of increasing legal requirements as to disclosure has, however, been accompanied by significant improvements and developments in these ethical standards.

4.03 When the question of disclosure first came under consideration, the needs of the short term creditor were paramount but the growing complexity of modern business organizations has tended to emphasize the needs and role of the long term creditor and the equity investor. While the disclosure requirements of creditors remain vitally important, the needs of the buyer and seller of securities, in particular of equity securities, dictate the objective towards which improvements in disclosure legislation should be directed.

4.04 No disclosure requirement, however, will be effective unless the resulting information is presented in a clear and understandable manner. Various professions contribute to the information provided by companies and their technical language, combined with that of those engaged in the securities business, often results in information which is difficult for the general public to interpret. It should be the function of securities legislation to ensure, so far as practicable, that financial information is presented in a form which is understandable to the investing public.

4.05 It is evident that optimum disclosure will not be attained until financial statements of business organizations are presented on a basis consistent with one another. At the present time two basically comparable companies may have their accounts presented using different accounting principles with the result that their financial position and operating results may appear to be quite different in their financial statements. It is necessary to work towards consistency in all financial statements and the Committee believes this consistency, together with clarity of presentation, can best be accomplished in Ontario by

The Institute of Chartered Accountants of Ontario developing uniform accounting principles to be applied in a uniform manner to all companies engaged in similar types of business.

4.06 We wish to stress the responsibility which rests on directors and management to provide adequate information concerning their companies. This basically entails full, true and plain disclosure of all material facts. Legal counsel and auditors also bear a professional responsibility in this respect. We recognize that the increased sophistication of investors and the alertness and competence of the financial intermediaries—members of investment firms, analysts and members of the financial press—have resulted in recent years in more knowledgeable interpretation of financial information.

Application of Disclosure Requirements

4.07 As a means of ensuring that the Committee's recommendations set out hereunder as to standards of financial disclosure are made applicable to companies incorporated under the laws of Ontario and, to the extent appropriate, to all companies, wherever incorporated, distributing securities in Ontario or listed on The Toronto Stock Exchange, the following is proposed.

(a) Appropriate amendments embodying such recommendations should be made to The Corporations Act.

(b) The Ontario Securities Commission should be empowered, by amendment to The Securities Act, to require written undertakings from companies, wherever incorporated, at the time of filing under the Act prospectuses relating to the sale of securities in Ontario, to comply with the Committee's recommendations hereunder as to annual and interim reporting, with the effect that:

(i) in the case of companies which have sold in Ontario (directly or through underwriters) any securities by means of such prospectuses, the annual financial statements of such companies shall, so long as any of the securities are outstanding, or until released by the Ontario Securities Commission from such undertakings, be required to comply, with respect to annual reporting, with Regulations to be made under The Securities Act, it being intended that such disclosure requirements shall, to the extent appropriate, be those prescribed by The Corporations Act (as to be amended); and

(ii) in the case of companies which have sold in Ontario (directly or through underwriters) by means of such prospectuses, shares or obligations convertible into shares, such companies shall, so long as any of the shares or obligations are outstanding, or until released by the Ontario Securities Commission from such undertakings, be required to comply, with respect to interim reporting, with Regulations to be made under The Securities Act, it being intended that such disclosure requirements shall, to the extent appropriate, be those prescribed by The Corporations Act (as to be amended).

(c) The Securities Act should be amended by adding thereto provisions requiring companies referred to in sub-paragraph (b) hereof to comply with the said Regulations to be made under The Securities Act.

(d) Copies of all financial statements required to be produced in accordance with the recommendations in this Part should be required to be filed as documents of public record with the Commission which shall be under no obligation to review and analyse such statements.

(e) The Securities Act should be amended to require The Toronto Stock Exchange to compel companies listed thereon to comply with Regulations to be made under the Act as to disclosure in financial statements of such companies, it being intended that such disclosure requirements shall, to the extent appropriate, be those to be prescribed by The Corporations Act (as to be amended).

(f) The Securities Act should be amended to provide that, in the event of the failure of a company to comply with the provisions of The Corporations Act (as to be amended) with respect to annual and interim reporting or the failure of a company to observe any undertaking given in accordance with the provisions of sub-paragraph (b) hereof or the failure of a company to comply with the provisions of The Securities Act (as to be amended) referred to in sub-paragraph (c) hereof, the Ontario Securities Commission in its discretion may refuse to accept for filing a prospectus of any such company.

4.08 Private companies (as defined in The Corporations Act) are prohibited from inviting the public to subscribe for their securities. Accordingly, the Committee's recommendations specifically relate to public companies. We are, however, mindful of the fact that certain of our recommendations could be equally applicable to private companies.

Annual and Interim Financial Statements

4.09 Generally speaking, the provisions of The Corporations Act ensure adequate financial disclosure for companies incorporated under that Act. The Committee has concluded, however, that certain improvements to such standards of disclosure should be made and accordingly the Committee makes the following recommendations.

Comparative Figures

4.10 There is no question that comparative figures in financial statements for shareholders add considerably to the understanding of a company's financial position and operating results. While this comparison can normally be developed from the annual accounts for the previous year, such accounts may not be readily available to the public. In almost all cases, there is relatively little additional work involved in producing financial statements in comparative form and the Committee accordingly recommends that this practice be adopted.

4.11 It is appreciated that there may be unusual cases or circumstances where comparative statements would not be meaningful or would be difficult to produce. Consequently, it

would seem desirable to permit a company to omit the presentation of statements in comparative form, provided that the company includes, as a note to its financial statements, the reason or reasons why comparative financial statements are not presented. A similar right presently exists, in section 89 (2) (a) (i) of The Corporations Act, with respect to the non-presentation of consolidated financial statements.

Source and Application of Funds Statements

4.12 Investors are becoming increasingly aware that the source and application of funds statement is most useful in giving an accurate portrayal of the manner in which a company has employed the funds which became available to it during the year to which the statement relates. Disclosure of this kind usually provides the investor with a better understanding of the use to which the company's funds were put than does the conventional statement of profit and loss. Generally speaking, the preparation of a statement of source and application of funds requires little or no additional work for the company as the figures to be included in this statement are readily derived from the company's records and accounts. There may, however, be unusual circumstances in which it is not appropriate to present a source and application of funds statement.

4.13 The Committee, therefore, recommends that The Corporations Act be amended to require the inclusion in financial statements of a statement of source and application of funds, provided that such statement may be omitted if the company includes as a note to its financial statements the reason or reasons why such a statement is omitted. See Paragraph 4.11.

4.14 In view of this recommendation, it would seem appropriate that the auditor should be required to express an opinion on the statement. We accordingly recommend that an appropriate amendment should be made to section 82 of The Corporations Act requiring the auditor to state in his report whether, in his opinion, the source and application of funds statement presents fairly the information shown therein.

Sales or Gross Revenue Figures

4.15 In studying the trend and relative profitability of a company's business, sales or gross revenues are of major significance. It is frequently suggested that sales figures should not be disclosed because they provide information of value to competitors. However, companies today are usually able to estimate with a fair degree of accuracy the share of the market which they enjoy in relation to their competitors. Over the past few years there has been a steady increase in the number of companies reporting sales, which would indicate that management is coming to recognize that withholding such information gives little or no protection to their competitive position. Sales figures are provided by many companies in the United States and by companies in a number of European countries.

4.16 It has been suggested that non-trading businesses have no sales figures as such. However, gross operating revenues are the equivalent of sales figures and normally provide, in these cases, an equally intelligible guide to the extent and rate of growth of the business operation.

4.17 In some instances, companies are reluctant to provide sales figures in their published financial statements on the ground that their competitors are not public companies and hence would not be required to make such information available. In other instances, such reluctance arises from the fact that some large corporations are comprised of several divisions which are not separate legal entities, so that the reporting of aggregate sales does not provide the competitor of any one division with information comparable with that which the latter is required to furnish. It is recognized that there may be unusual circumstances where such disclosure would in fact be detrimental to the interests of a company and that some provision should, therefore, be made for its omission in the financial statements.

4.18 The Committee recommends that The Corporations Act be amended to require the inclusion in the statement of profit and loss of the amount of sales or gross revenues, as the case may be, for the period covered by the statement, provided that a judge of the Supreme Court of Ontario may, on being satisfied that the disclosure of such information would actually be detrimental to the interests of the company, authorize its omission from the statement of profit and loss. Such authorization should be required each year in order to ensure that the circumstances justifying the omission continue to exist. We suggest that such exemptions be effected by way of application made to a judge designated in a manner similar to that prescribed in section 74 of the Companies Act (Canada) and that notice of any such application should be given to the Ontario Securities Commission, which should have the right to appear and be heard.

Remuneration of Directors and Officers

4.19 It is of importance to the investor to know the direct cost of senior management of the company. Although remuneration of management may be regarded as only one of many profit and loss items, an important justification of a comprehensive degree of disclosure of such remuneration is that it provides a means by which an investor can assess whether the amount of company funds allocated by management to itself by way of remuneration is reasonable.

4.20 The Corporations Act presently provides in section 84 (1) (i) for disclosure in the statement of profit and loss of the following:

> "total remuneration of directors *as such* from the company and subsidiaries whose financial statements are consolidated with those of the company, including all salaries, bonuses, fees, contributions to pension funds and other emoluments;"

The words "as such" are interpreted as requiring only the disclosure of fees paid to directors in that capacity and not as including remuneration paid to them as officers of the company or otherwise. In the opinion of the Committee this is not adequate disclosure of the direct cost of senior management.

4.21 The Committee recommends that The Corporations Act be amended by repealing the foregoing provision and requiring disclosure, in the statement of profit and loss, of the

aggregate direct remuneration paid by the company and its subsidiaries to all directors and executive officers of the company for services in all capacities. The term "executive officers" is to be defined, for this purpose, to mean the Chairman and any Vice-Chairman of the Board of Directors, the President, any Vice-President, the Secretary, the Treasurer, the General Manager and any other person performing functions similar to those of such officers and any other employee, not included in the foregoing, whose remuneration is one of the five highest paid by the company or its subsidiaries to such officers and other employees of the company.

Obligations in Respect of Pension Benefits

4.22 Pension costs are becoming an increasingly important factor in the conduct of business operations. The introduction of pension legislation by the Federal Government and the coming into force of The Pension Benefits Act (Ontario) has focused attention on this area of compensation; many enterprises may find it desirable to set up supplementary pension plans and many existing pension plans will require major revisions. In numerous cases the introduction of new plans and changes in existing plans will create obligations in respect of such plans, either for past service or on the basis of changes in calculations with respect to current service. Such obligations may be met by payment over a period of years. It is important for the investor to have information as to any liability in respect of pension benefits which has not been provided for in the accounts of the company and as to the manner in which it is proposed to make payment for this liability and the basis on which it is proposed to charge the related costs against operations.

4.23 The Committee recommends that section 87 of The Corporations Act be amended to require the disclosure of information by way of note as to the amount of any obligation for pension benefits arising from service prior to the date of the balance sheet which has not been provided for in the accounts of the company, the manner in which the company proposes to make payment in respect of such liability and the basis on which such related costs are being absorbed as charges against operations.

Interim Reporting

4.24 There is presently no provision in Ontario legislation to compel companies to report to their shareholders on the financial affairs of the company more frequently than once a year. Failure to provide interim information means that shareholders of most companies must wait at least until the end of the financial year for a report on their company's activities and, in many cases, because annual reports are often not released until three or four months after the year-end, considerably longer.

4.25 Many leading companies presently issue interim financial reports, although there is no legal obligation to do so. The federal securities laws of the United States require many public companies to furnish interim reports to shareholders and the Stock Exchange, London, has recently recommended that companies quoted on such Exchange similarly furnish interim reports.

4.26 The Committee believes that more frequent reporting would be of material assistance to investors. Shareholders would be better able to analyse their investments in companies

in the light of current information. At the same time, more frequent reporting would tend to relieve directors and executive officers of the uncomfortable burden of possessing exclusive information which could influence buying, selling or holding securities of the company.

4.27 It is sometimes contended that shareholders will derive a distorted picture from interim reports because of the seasonal or cyclical nature of the business of a particular company. However, comparative figures for the like period in the previous year would enable appraisal of interim results in a proper perspective, even under those circumstances. In any event, management always remains free to comment in the report on any extraordinary events or conditions which might otherwise render an interim report misleading.

4.28 While the Committee recognizes that quarterly periodic reporting may be desirable, it seems reasonable to the Committee because of the cost and inconvenience entailed, even if relatively nominal, to limit the legal requirement for interim reports to a semi-annual basis. The Committee recommends that The Corporations Act be amended to require companies to furnish shareholders semi-annually with interim reports containing a source and application of funds statement and sufficient relevant information in summary form to reflect the over-all results of operations for the period covered by the report, including sales or gross revenues, extraordinary items of income or expense, net income before income taxes, income taxes and net income. Such interim reports need not be audited. The interim reports should be furnished to the shareholders within 60 days of the terminal date of the period covered by such reports. Where any of such information is omitted in a company's latest annual financial statements as permitted by the recommendations for exclusion contained in Paragraphs 4.11, 4.13 and 4.18, the company should be permitted to omit such information in its interim report.

Financial Disclosure in Prospectuses

4.29 The Committee has considered the degree of financial disclosure presently required to be made in prospectuses filed under The Securities Act relating to the primary distribution of securities to the public. Such disclosure is required to be made by virtue of various provisions of that Act and, more importantly, by the terms of a statement of policy issued on April 1, 1959 by the Ontario Securities Commission.

4.30 Such statement of policy sets out financial disclosure requirements which are almost identical with those contained in The Corporations Act, except that certain information as to profit and loss items required by that Act need not be contained in earnings statements included in prospectuses. The statement of policy was based to a considerable extent upon the research bulletins issued by the Committee on Accounting and Auditing Research of the Canadian Institute of Chartered Accountants. The Institute of Chartered Accountants of Ontario forms part of the Canadian Institute and, we understand, fully supports the bulletins issued by that body.

4.31 The Committee recommends that the statement of policy be replaced by Regulations made under The Securities Act so that matters of policy relating to financial disclosure in prospectuses can be more formally stated in published form.

4.32 The Committee also recommends the formation of an Advisory Committee to the Ontario Securities Commission drawn from members of The Institute of Chartered Accountants of Ontario which could assist and advise the Commission on financial disclosure requirements to be embodied in the Regulations from time to time.

4.33 The Committee further recommends that The Securities Act be amended to give effect to the following.

(a) Prospectuses of industrial, investment and mining companies filed under the Act shall include a statement of surplus in form similar to that required by section 85 of The Corporations Act covering the same period, year by year, for which the related statement of earnings is required. Only prospectuses of investment companies have heretofore been required to contain a statement of surplus of any kind.

(b) Prospectuses of industrial, investment and mining companies filed under the Act shall include a statement of earnings covering the last five completed financial years of the company (or such shorter period as the Commission may require) and any part of a subsequent financial year to the date at which the balance sheet required for the prospectus is made up. In the case of the inclusion of earnings for part only of a financial year, the statement shall include unaudited earnings for the same period in the preceding financial year. The Act presently calls for statements of earnings covering the last five completed financial years of the company and any part of a subsequent financial year to the date at which the balance sheet required for inclusion in the prospectus is made up, or for such shorter or longer period as the Commission may require, but not for a longer period of more than five additional years. We have concluded that a period of five years should be adequate for the protection of investors.

(c) Prospectuses of industrial, investment and mining companies filed under the Act may include, in lieu of audited financial statements as of a date not more than 120 days prior to the date of the prospectus, unaudited financial statements as of a date not more than 90 days prior to the date of the prospectus, provided that the prospectus also contains

(i) the audited balance sheet for the last completed financial year, if the close of such financial year is not more than one year from the date of the prospectus; and

(ii) unaudited statements of earnings and surplus for the same period in the preceding financial year.

The present provisions in the Act requiring the inclusion in prospectuses of audited financial statements not more than 120 days old means in practice that where an issue of securities is to be made more than four months after the issuer's financial year-end, a special audit, with its attendant inconvenience and expense, is required.

The Committee has concluded that the present requirement is unnecessarily restrictive. The Regulations to be passed under the Act should, however, require the auditor of the company to provide the Commission with a letter to the effect that, while an examination of the accounts of the company has not been carried out in respect of the unaudited financial statements, enquiries have been made and information obtained sufficient to lead the auditor to believe that the unaudited financial statements are reliable.

(d) Prospectuses of mining and industrial companies in the promotional, exploratory or development stage filed under the Act shall include a source and application of funds statement or a cash receipts and disbursements statement covering the last five completed financial years of the company (or such shorter period as the Commission may require) and any part of a subsequent financial year to the date at which the balance sheet required for the prospectus is made up and, unless required by the Commission, the statements of surplus and of earnings as recommended for inclusion under (a), (b) and (c) above may be omitted from such prospectuses. The Act does not presently call for source and application of funds statements or cash receipts and disbursements statements to be included in prospectuses of any class of company. Companies in the promotional, exploratory or development stage usually have had little or no earnings. In these circumstances, statements of earnings are not meaningful since the major part of the activities of such companies will have consisted of the expenditure on promotion, exploration or development of the funds raised by means of securities issues. The most meaningful statements which can be provided are either a source and application of funds statement or a cash receipts and disbursements statement.

(e) At present, the Act requires that prospectuses include the statement of earnings and balance sheet of the issuer and all subsidiaries on a consolidated basis, unless the Commission otherwise directs. It would seem more reasonable that exclusions from consolidation of accounts should be with the permission of, rather than at the direction of, the Commission.

(f) The present requirement in the Act for the mandatory inclusion in prospectuses of a pro forma combined statement of earnings where the proceeds of the issue are to be applied in whole or in part, directly or indirectly, in the purchase of a business (unless the Commission requires a statement of earnings of such business) should be deleted and there should be substituted therefor provisions substantially to give effect to the following:

(i) that a pro forma combined statement of earnings be included only where the Commission permits or requires it and only for such period or periods as it may permit or require; and

(ii) that the statement of earnings of the business being acquired be included as a separate statement if permitted or required by the Commission.

(g) The provisions in the Act as to the form and content of the auditors' report on financial statements should be amended to conform, *mutatis mutandis*, to the comparable provisions of The Corporations Act (as to be amended).

4.34 The Committee recommends, as referred to in Paragraph 4.31, that Regulations be made under The Securities Act (after consultation with the proposed Advisory Committee of The Institute of Chartered Accountants) relating to disclosure in financial statements in prospectuses filed under the Act. Such Regulations should, to the extent applicable, comply with the financial disclosure requirements of The Corporations Act (as to be amended).

4.35 In addition, the Regulations should make provision for the following matters relating to financial statements in prospectuses:

(a) the disclosure, by way of footnote, of the basis of providing depreciation and depletion;

(b) the disclosure, by way of footnote to the statement of earnings, of information as to the earnings of 50 per cent owned companies similar to the information required in respect of unconsolidated subsidiaries;

(c) a requirement that, except where the "pooling of interest" accounting concept is involved, subsidiaries' earnings should be included in a consolidated statement of earnings only from the date of acquisition of the subsidiary;

(d) a requirement that, where earnings from a business acquired during or subsequent to any period covered by the statement of earnings are included in the statements forming part of a prospectus and where material adjustments will be necessary in subsequent years as a result of the transactions involved in the acquisition (e.g. where fixed assets are acquired, directly or indirectly, from a vendor at values substantially in excess of book values, with correspondingly higher charges required for depreciation), the effect of such adjustments be disclosed either by footnote to the statement of earnings or in a pro forma statement showing the adjusted results of operations for the relevant years or period included in the earnings statement;

(e) a requirement that, where income taxes of subsidiary companies which must be deducted in arriving at consolidated earnings available for debt interest of the parent company-issuer are material in amount:

  (i) the statement of consolidated earnings to be included in a prospectus relating to bond, debenture and other debt issues be drawn up to reflect the deduction of such income taxes as a separate item, or

  (ii) the consolidated earnings available for debt interest after deduction of such income taxes be disclosed by footnote to the statement of earnings;

(f) a requirement to the effect that (except in the case of public utilities subject to regulation) where deferred tax accounting has not been followed with respect to capital cost allowances (and, in the case of extractive industries, with respect to exploration and development expenditures), there shall be disclosed by footnote to

the statement of earnings the income tax provisions, year by year, on a deferred tax basis and the net earnings, year by year, on such basis;

(g) a requirement for disclosure, in respect of long term leases, of significant information such as the amounts of rentals incurred as an expense in the last completed financial year and the minimum amounts which will be incurred as rental expense over some relevant specified periods of years in the future;

(h) a requirement that no qualification be permitted in reports of auditors where it is practicable for the company to revise its presentation with respect to the matters which would otherwise be the subject of a qualification; and

(i) a requirement that estimates of future earnings be included only with the specific permission of the Commission, that any such earnings be clearly identified as estimates and that the auditor's name not be associated with any such estimates.

PART V

FORM CONTENT AND DISTRIBUTION OF PROSPECTUSES

Criticism of Present Practice

5.01 The Canadian Bar Association Committee pointed out in its brief to the Committee that prospectuses filed with the Ontario Securities Commission contain "statutory information which is generally drafted in legal language which is largely incomprehensible to laymen and which is expected to be read only by the Commission and the more persevering analysts". With this observation we are in full agreement.

5.02 The current practice in Ontario, although perhaps not a legal requirement, is to draft prospectuses by paraphrasing the language of each of the enumerated items set out in sections 38, 39 or 40 of The Securities Act for mining, industrial and investment companies, as the case may be. Some of the items included in these sections are archaic, and others are not clearly expressed, with the result that frequently the objective of "full, true and plain disclosure" of all material facts as contemplated by the Act is not achieved.

5.03 In fairness, it should be pointed out that in the case of many prospectuses this problem has in practice been overcome in part by including a so-called "President's letter" in the front section of the prospectus, which in most instances contains a fairly accurate narrative description of the material facts relative to the security issue.

5.04 It can, in any given case, be an extremely complex and difficult task to organize in a concise, logical and understandable manner all the material facts with respect to a security issue. Indeed, the best way to organize the material facts can vary from one set of circumstances to another. It is nevertheless essential to prescribe, within reason, some rules as to the manner in which material facts should be organized in the prospectus. With this in mind, the Committee has examined the prospectus requirements of the legislation of other countries, in particular the United Kingdom and the United States. We inquired into the general financial practices in connection with the issue of securities in those jurisdictions and concluded that the financial practices of the United States are most nearly parallel to those of Ontario.

5.05 The S.E.C. has now been administering the Securities Act of 1933 for more than thirty years. The Committee's study disclosed that such Act is a promising source of material from which improvements to the present Ontario system might be derived. Before recommending the adoption of any material from that Act and its Regulations it was, however, carefully examined to ensure that the particular material is in fact applicable to Canadian practice.

5.06 We have examined a number of prospectuses filed with the S.E.C. and have compared them with similar prospectuses filed with the Ontario Securities Commission. One conclusion is inescapable: most S.E.C. prospectuses present a clearer and more easily understood picture of the state of the affairs of the company than do Ontario prospectuses.

5.07 The Committee considered what steps could be taken to improve the manner of presentation of material and content in Ontario prospectuses. The S.E.C. success is achieved by a combination of clear rules and an adequate staff of highly qualified administrators. A comparably detailed examination of prospectuses would be impossible for the Ontario Securities Commission to conduct with its present staff. In Ontario, as a practical matter, it is therefore advisable at this time to concentrate on the "clear rules" approach to the reform of prospectus requirements.

5.08 If the recommendations contained in this Report are adopted, it will nevertheless be necessary to increase the staff of the Commission, a requirement which is discussed in Part VIII. While the S.E.C. practice of making a thorough examination of the contents of each prospectus appears to have worked reasonably well, there is much to be said in favour of a system which imposes the responsibility for accuracy of contents on the issuer, leaving with the Commission its present role of examining prospectuses to determine whether or not they comply with The Securities Act.

5.09 The Committee agrees with the approach set out in the general instructions contained in the prospectus form prescribed by the S.E.C. for industrial issues:

> "The purpose of the prospectus is to inform investors. Hence, the information set forth in the prospectus should be presented in clear, concise, understandable fashion. Avoid unnecessary and irrelevant details, repetition or the use of unnecessary technical language. The prospectus shall contain the information called for by all of the items of Part 1 of the form, except that no reference need be made to inapplicable items, and negative answers to any item may be omitted."

To accomplish this objective, the Committee recommends that the prospectus be in narrative form. It should be capable of being read by investors generally and not only by security analysts and other trained persons. The general practice in Ontario, which has grown up largely by reason of the form in which sections 38, 39 and 40 of The Securities Act are cast, is for the draftsman of the prospectus to deal with the particular items enumerated in the applicable section. In general this is accomplished by paraphrasing, by way of answer, the language of each item. It is often only incidental if the results are comprehensible.

5.10 An example of the defects in the Ontario practice is the use of negative answers to questions which are not relevant in the particular case with resulting confusion for the reader. Presenting information in a narrative form would admittedly make it more difficult for the Commission to check the completeness of the content of the prospectus. This problem could be partially overcome by the inclusion of a table of contents to the prospectus and could be fully overcome by a checklist related to the statutory items which would be included with the material filed with the Commission, although not forming part of the prospectus.

5.11 The Committee recommends that The Securities Act be amended to introduce the following general changes in prospectus requirements, with the intention of making the Ontario prospectus a clearer and more readable document:

(a) the material should be grouped under appropriate headings in the prospectus;

(b) a reasonably detailed table of contents should be included at the beginning of the prospectus;

(c) a statutory standard of clarity should be adopted similar to that referred to in Paragraph 5.09; and

(d) a distinction should be drawn, as in S.E.C. registration statements, between information which should be included in the prospectus and information which may be required to be furnished to the Commission for the purpose of checking the prospectus or otherwise.

5.12 The forms and accompanying instructions that are prescribed by the S.E.C. for the guidance of registrants in preparing registration statements perhaps constitute the chief explanation for the fact that the S.E.C. prospectus is in general a clearer and more understandable document than a prospectus prepared under the present requirements of The Securities Act. In all, there are 17 different forms used for various types of S.E.C. issues. For example, Form S.-1 is the general form to be used by commercial and industrial companies where no other form is authorized or prescribed; S.-2 is used for shares of certain corporations (other than mining, investment or insurance corporations) in the development stage; S.-3 is used for shares of speculative mining corporations; and S.-4, S.-5 and S.-6 are used, respectively, for closed-end and open-end management investment companies and unit investment trusts registered under the Investment Company Act. Each form contains the items that must be included in the prospectus and general and detailed instructions to guide the draftsman. Following the form is not an absolute guarantee that the result will be comprehensible but it at least ensures that the draftsman will stay on the road to readability.

5.13 The Committee studied Form S.-1 in considerable detail and compared the items required by it with the comparable items required by section 39 of The Securities Act. In most particulars the S.E.C. form was superior to the Ontario statutory requirements. In some cases the Ontario provision was uncertain, in others it was incomplete, and in still others it was unnecessary. In very few cases was the Ontario provision more desirable. If the Committee's recommendation that the use of forms comparable to those used by the S.E.C. is accepted, the onerous task of drafting acceptable forms will have to be undertaken. A guide to the drafting of these forms is given in Appendix C where the Committee has set out its recommendations as to the manner in which the material facts for an industrial issue should be presented.

5.14 Although experience in using the forms may dictate that additional forms are required, the Committee considers that at the outset four separate forms would be sufficient: for mining companies (to replace present section 38 of The Securities Act); for industrial companies (to replace present section 39); for investment companies (to replace present section 40); and for mutual funds[1] which are presently, though inappropriately, dealt with as investment companies under The Securities Act.

5.15 There are several possible ways of providing for the use of forms: (a) by incorporating the forms in The Securities Act or as a schedule thereto; (b) by providing for the promulgation of forms by regulation; or (c) by the Commission requiring compliance with forms prescribed by it as a matter of administrative policy. Alternative (c) is unacceptable, even if it could be considered permissible under the present legislation: a radical change in the form and content of the prospectus should have legislative authorization. Alternative (a) suffers from the defect of inflexibility; amending a statute is too cumbersome a method of making changes in the forms which will be required from time to time. Therefore, the Committee recommends that the forms should be prescribed by regulation. As a consequence, sections 38, 39 and 40 of The Securities Act as they presently exist would require extensive amendment.

Speculative Mining or Oil Company Prospectuses

5.16 In addition to the Committee's general recommendations set out above, certain further conclusions were reached on a number of particular matters relating to speculative mining and oil company prospectuses.

5.17 Perhaps the most important of these is that an introductory statement should be required in prospectuses of mining and oil companies in the pre-production stage clearly outlining the speculative nature of the security and the factors which make it so. For example, the S.E.C. Form S.-3 for mining companies requires that:

> "Where appropriate to a clear understanding by investors of the speculative or promotional nature of the enterprise, an introductory statement shall be made in the prospectus summarizing the factors which make the offering a speculation and setting forth such matters as a comparison, in percentages, of the securities being offered to the public for cash and those issued or to be issued to promoters, directors, officers, controlling persons and underwriters for cash, property and services."

The following is an example of such an introductory statement taken from a prospectus of a Canadian company filed with the S.E.C.:

> "Since acquisition of its mining claims the Company has carried out some sampling and preliminary surface examination at a cost of $300.00, but the Company has made no geological examination and accordingly the planned work is without benefit of such an examination. There has been no exploration

1. See Appendix D for the Committee's comments on mutual funds.

or development work undertaken by the Company, and no production nor discovery of mineable ore bodies has resulted from the small amount of sampling and preliminary examination carried out by the Company. The Company has no knowledge of any mineable ore bodies on its property. The exploratory program proposed to be carried out with proceeds received through the sale of the securities offered hereby, is strictly speculative in character.

"None of the Company's shares are firmly underwritten or under option save that the Company has entered into an agreement with "X" Corporation Limited to act as agent for the Company and use its best efforts to effect the sale of the 200,000 shares offered hereby. There is no market for the shares of the Company at this time."

The prospectus filed under The Securities Act in respect of the same issue of securities contained no comparable statement. The Committee recommends that The Securities Act be amended to require similar introductory statements to be set out prominently in prospectuses relating to speculative issues.

5.18 The S.E.C. Form S.-3 requires a clear and precise statement with regard to the dilution of the equity of the purchasers of the issue by vendors' shares previously issued at prices substantially below the price at which the issue covered by the prospectus is being marketed. For example, in a case of a speculative Canadian gold mining issue which the Committee considered there was both an S.E.C. and an Ontario prospectus. In the S.E.C. prospectus there was a clear statement showing that, assuming that the issue were fully taken up at the offering price of 50¢ per share, the resulting book value of all issued shares would, by reason of the dilution caused by the prior issue of vendors' shares at an average of $.006 per share, be 6½¢ per share. In the Ontario prospectus relating to the same issue, while it is possible by making computations from information contained in the prospectus to obtain the facts as to dilution, only a security analyst or other trained person would be likely to make the necessary computations.

5.19 The essence of the mining prospectus is the prospect of discovering minerals which is usually described in the geologist's report required to be included by The Securities Act. The mining prospectus would be more meaningful if the salient points of the geologist's report were set out (to the extent possible) in non-technical language in the narrative of the prospectus, rather than the whole of the report being included. At the present time the Act (section 38 (2)) requires that

". . . a full and up-to-date report on the property of the mining company and the development thereof made by a person who in the opinion of the Commission is a qualified mining engineer, geologist or prospector, certified by such person . . . shall accompany the prospectus . . .".

Although, in theory, the present system of including the geologist's report should be satisfactory, such report is understandably couched in technical language and often results in less

than "full, true and plain disclosure". Further, the geologist occasionally goes somewhat outside his field of expertise. In some prospectuses we examined, the geologist's report resembles a selling document rather than an expert's report. It is difficult for the Commission to insist upon changes in the language used in the expert's report because it is issued by him in his capacity as an expert. If the draftsman of the prospectus were responsible for including in the body of the prospectus in narrative form the relevant facts derived from the geologist's report, the Commission would have little difficulty in restraining the draftsman from including material which obviously has primarily a selling purpose. The propriety of such narrative in the prospectus would more readily be a matter of negotiation between the issuer and the Commission than is the terminology of the geologist's report.

5.20 The full geologist's report should, however, continue to be filed with the Commission. Although the Commission may not be in a position to test the validity of most statements made in the prospectus, it will, at the least, be able to determine whether or not the relevant statements in the prospectus are borne out by the geologist's report. We recommend that the filed report should be available to members of the public for inspection.

Opinions Filed with the Commission

5.21 The Committee recommends that a provision should be added to The Securities Act comparable to section 7 of the Securities Act of 1933 to the effect that, where an accountant, engineer or appraiser or any person whose profession gives authority to a statement made by him is named as having prepared or certified any part of the prospectus or is named as having prepared or certified a report or valuation, the written consent of such person must be filed with the Commission unless the Commission dispenses with such filing as impracticable or as involving undue hardship on the issuer filing the prospectus. At the present time The Securities Act requires only the filing of the consent of the auditor or accountant to the use of his report on the financial statements.

Financial Disclosure in the Prospectus

5.22 This topic is dealt with in Part IV of this Report dealing with financial disclosure generally.

Execution of Prospectus

5.23 The Securities Act presently requires that a prospectus be signed by the promoter, if any, the underwriter or optionee and all the directors of the issuer. Under the Act a person is permitted to sign by his agent. Further, there is a discretion in the Commission to dispense with the signature of any person, when such person is, for adequate cause, not available. In many of the prospectuses which the Committee examined substantially more than half of the directors signing did so by agent. The Committee has concluded that the present method of signing a prospectus is cumbersome and unnecessary and consequently recommends that The Securities Act be amended to provide that a prospectus be personally signed by the promoter, if any, the underwriter or optionee, the chief executive

officer and the chief financial officer of the issuer and on behalf of the board of directors by any two directors of the issuer. We recommend no change in the liability of the directors of the issuer under section 69 of The Securities Act. The Commission should have a discretion, for adequate cause, to permit the prospectus to be signed, in lieu of signing by any one or both of the above-mentioned officers, by any other responsible officer or officers of the issuer. The present discretion of the Commission to dispense, for adequate cause, with the signature of any person if such person is not available, should be continued.

Distribution of Securities

5.24 There are two basic elements or factors in connection with distribution of securities, which, although to a certain extent inconsistent with one another, should be taken into account in any laws or regulations dealing with the distribution of securities. First, so long as our legislation is based upon a philosophy of "full, true and plain disclosure" of the material facts relating to an issue of securities, it is essential that a prospective purchaser should have adequate opportunity to review the prospectus before a legal obligation to purchase arises. Secondly, it is necessary to recognize certain prevailing practices relating to the distribution of a security issue. It is most important for an investment dealer, particularly in the case of a firm commitment underwriting, to be able to sample and gain indications of the strength of the market prior to the date upon which securities can be legally sold. At present, because of the absolute prohibition against trading until the acceptance for filing of the prospectus, an issue is either sold within a day or two after the acceptance for filing of the prospectus with the result that a purchaser has little, if any, chance to study the prospectus or, more frequently, the prohibition against trading before filing is ignored. The Committee therefore recommends that The Securities Act be amended to adopt the following procedures for the distribution of security issues of all types.

No Pre-Filing Trades

5.25 During the period prior to the filing with the Commission of a preliminary prospectus, referred to in Paragraph 5.26, there should be an absolute prohibition against any "trading" (as such term is presently defined in section 1 (u) of The Securities Act) in the issue in respect of which the prospectus is filed, except for negotiations and agreements between the issuer and the underwriter or other fiscal agent.

Preliminary Prospectuses

5.26 There should be a mandatory obligation to prepare and file with the Commission a preliminary prospectus. The preliminary prospectus should contain substantially the information required by The Securities Act and Regulations thereunder to be included in the final prospectus, including financial statements in substantially final form (subject to audit requirements hereafter referred to), except for the omission of information with respect to the offering price and other matters dependent upon or relating to the offering price.

The Waiting Period

5.27 During the period between the filing of the preliminary prospectus and its acceptance for filing by the Commission (the "waiting period") no trading whatsoever should be permitted except for the following.

(a) It should be permissible to distribute a notice, circular, advertisement or letter of communication with respect to the security being issued if it states from whom a preliminary prospectus may be obtained and in addition does no more than identify the security, state the price thereof, if then determined, state by whom orders will be executed and contain such further information as the Commission by Regulation may permit.

(b) It should be permissible to obtain expressions of interest from prospective purchasers who have been furnished copies of the preliminary prospectus but no agreements of sale should be entered into or completed.

5.28 By following the above procedure it would be possible when a preliminary prospectus is delivered to permit prospective purchasers to study the merits of the security issue and to permit underwriters to test the market. One of the possible dangers in the use of a preliminary prospectus is that it would not be in final form and therefore might be more misleading than instructive. In order to avoid this possible danger and to make the waiting period more effective, the following changes should be made in the law.

(a) Although as a matter of present practice there is a fairly lengthy waiting period between the date of the filing of the draft prospectus and its acceptance for filing, a minimum period of, say, ten days should be fixed by the Act or Regulations so that there will be a period of at least ten days between the date of filing of the preliminary prospectus and the acceptance for filing of the final prospectus within which the market can be tested and prospective purchasers can study the terms and conditions of the issue.

(b) If it appears to the Commission that the preliminary prospectus which is being distributed does not contain substantially the information required by The Securities Act and Regulations, the Commission should have authority to issue a stop order preventing any further trading whatsoever in the security issue until the preliminary prospectus is in a form acceptable to the Commission and copies thereof have been delivered to all persons who have theretofore received a copy of the defective preliminary prospectus. A record of the distribution of the preliminary prospectus should be carefully maintained by the issuer or underwriter in order to provide effective control as to its distribution. The Act should contain adequate penalties to prevent distribution of a preliminary prospectus that does not substantially meet the requirements of the Act and Regulations.

(c) The preliminary prospectus should have printed on the front cover thereof a statement similar to that required by the S.E.C. preliminary prospectus. The statement might read as follows:

> "This is a preliminary prospectus relating to these securities, a copy of which has been filed with the Ontario Securities Commission but has not yet been accepted for filing. Information contained herein is subject to completion or

amendment. These securities may not be sold nor may offers to buy be accepted prior to the time the prospectus is accepted for filing."

(d) In order further to assure that the preliminary prospectus is substantially in accordance with the Act, the Committee recommends that such preliminary prospectus should be signed in the same manner as the final prospectus is required to be signed. See Paragraph 5.23.

(e) The Committee does not think it feasible to require that the report by the auditors on the financial statements in the preliminary prospectus be signed by the auditors at the time of its filing. There should, however, be a requirement that the auditors of the issuing company must, at the time of the filing of the preliminary prospectus with the Commission, provide a letter to the Commission to the effect that such auditors have reviewed the form and content of the financial statements contained in the preliminary prospectus and that, although an audit has not been completed, such financial statements appear to be a reasonable presentation of the financial position and earnings of the company.

Post-Effective Period and Rescission

5.29 After the prospectus has been accepted for filing by the Commission, the underwriters and members of the selling group will be permitted to proceed with the sale of the securities. No further literature other than that permitted during the waiting period should be distributed. The procedure with respect to the delivery of the final prospectus and the creation of a legal obligation to purchase the securities being issued should ensure that no agreement of purchase or sale should be binding on the purchaser until the later to occur of: (i) the expiration of two business days after the receipt by the purchaser of a copy of the final prospectus; or (ii) the expiration of one business day after the receipt by the purchaser of the confirmation notice of the sale. The confirmation notice should have conspicuously printed thereon a statement indicating that the purchaser is not obliged to purchase until the expiration of the above-mentioned periods and that the purchaser can avoid any liability to purchase by notifying, within the time limits indicated, the person who forwarded the confirmation notice that he does not wish to purchase. If this procedure is followed, although the purchaser may have agreed to purchase securities prior to the receipt of the final prospectus, he will have a minimum period within which to examine the prospectus before becoming legally obligated to complete his purchase. In a case where a purchaser has seen a preliminary prospectus, the examination of the final prospectus should not be an onerous task.

5.30 The Committee considered what rights of rescission should exist if the prospectus contains materially misleading statements. We also considered rescission in relation to the problems arising from amendments to the prospectus where a change in material facts occurs during the period of primary distribution to the public. If the prospectus delivered to the purchaser contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained in the prospectus, in the light of the circumstances in which they were made, not misleading, then the purchaser should have a right of rescission. Such right of rescission should exist not only where the prospectus

as accepted for filing contains information that was at that time misleading, but also where, because of a change in circumstances, the information was misleading when the prospectus was delivered to the purchaser. The Committee therefore recommends that, without derogating from any common law rights a purchaser may have, if the prospectus delivered to a purchaser includes, as of the date of delivery, any untrue statement of a material fact or, as of the date of delivery, omits to state a material fact necessary in order to make the statements contained therein, in the light of the circumstances in which they were made, not misleading, the purchaser should have a right of rescission, exercisable by action commenced prior to the first to occur of:

(a) 30 days after the fact that such information is misleading first comes to the attention of the purchaser; or

(b) 60 days after the delivery of the prospectus to such purchaser.

The prospectus should have conspicuously printed thereon or therein a statement describing the above-mentioned rights of rescission.

The Corporations Information Act

5.31 The Committee recommends that the prospectus requirements of The Corporations Information Act (Ontario) be repealed as serving no useful purpose.

PART VI

PROXIES AND PROXY SOLICITATION

Significance of the Proxy

6.01 In corporation law, an "instrument of proxy" is an instrument in writing whereby a shareholder of a company appoints another person to attend and act on his behalf at a meeting of shareholders in the same manner and to the same extent as if the shareholder himself were present at the meeting. Technically, a "proxy" is the individual appointed by the instrument of proxy,[1] but by commercial usage the word "proxy" has come to mean the document by which a proxy is appointed. The Committee has followed that usage in this Report and refers herein to the person appointed by such a document as a "nominee".

6.02 In these days of large public companies with numerous shareholders, who as a rule do not have a voice in management of the company, the proxy assumes major significance in the control of companies. In most cases, management of public companies sends out proxies in a form that invites shareholders who are unable to attend meetings in person to appoint only nominees of management to vote at meetings of shareholders. In this way, there is a marked tendency for management to perpetuate itself in office. Further, proxies have been solicited to approve corporate action in cases where the shareholders have not been given sufficient information on which they could reasonably be expected to come to an informed decision.

6.03 If the information given to the shareholders at the time their proxies are solicited is insufficient, shareholder approval of a particular proposal might be forthcoming which would not be the case if all the facts were adequately disclosed in a comprehensible manner. While shareholders' approval, obtained on the basis of misleading or inadequate information, could well be set aside by the courts, in most cases individual shareholders own such a small interest in the company that it is unlikely they will institute court proceedings in respect of the particular transaction.

6.04 The following statement of Professor Louis Loss is apposite:[2]

> "Corporate practice has come a long way from the common law's non-recognition of the proxy device. The widespread distribution of corporate securities with the concomitant separation of ownership and management, puts the entire concept of the stockholders' meeting at the mercy of the proxy instrument. This makes the corporate proxy a tremendous force for good or evil in our economic scheme. Unregulated, it is an open invitation to self-perpetuation and irresponsibility of management. Properly circumscribed, it may well turn out to be the salvation of the modern corporate system."

6.05 Section 75 of The Corporations Act confers upon shareholders the right to attend

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1. Section 75 of The Corporations Act, R.S.O., 1960, c.71.
2. Loss, *Securities Regulation* (2nd ed.) Vol. II, p. 857.

and vote at meetings of shareholders by way of proxy and prescribes certain requirements as to the form of proxy itself, which are, for the most part, restrictive in nature. The Ontario law contains no provision as to the manner of soliciting proxies and does not make mandatory the solicitation of proxies.

6.06 In the United Kingdom, no legislation exists governing the solicitation of proxies either by management or others. However, shareholders do have a statutory right to attend meetings of shareholders by proxy and to vote thereat by such means.[3]

6.07 In the United States, the law respecting the form of proxies and proxy solicitation has developed in a somewhat different manner than in the United Kingdom and Canada. As a result of certain abuses of the proxy in the United States, a detailed and comprehensive set of rules was passed under section 14 (a) of the Securities Exchange Act of 1934.[4] Briefly, these rules govern the form of proxy and the information required to be forwarded to shareholders of companies subject to such Act when proxies are solicited. Such information is required to be set out in a document known as a proxy statement which must accompany or precede the proxy. The information included in the proxy statement must be clearly presented and the statements therein divided into groups according to subject matter. See also Paragraph 6.18. The proxy statement or its equivalent has no counterpart in the law of either the United Kingdom or Canada where the general rule laid down by the courts is that a notice of meeting of shareholders must state with reasonable precision the nature of the business to be transacted at the meeting. The Jenkins Committee was of the opinion that the existing law in the United Kingdom was not satisfactory and recommended that statutory provisions be enacted to set out in a general manner the responsibility of directors to give shareholders adequate information with respect to the nature of the business to be transacted at a meeting.[5]

6.08 Under the present Ontario practice, the typical form of proxy contains no means whereby a shareholder may vote against a resolution and does not provide a blank space or give adequate instructions as to how the shareholder may, if he wishes, appoint a nominee other than management nominees. Further, the usual form of proxy does not indicate on whose behalf it is being solicited.

6.09 The Committee considered three main questions with respect to this topic: first, the contents of the form of proxy itself; second, the information which should be furnished by management or others to shareholders prior to a meeting of shareholders, if proxies are solicited, and the form in which such information should be presented; and third, whether or not public companies should be required to solicit proxies, that is, whether or not forms of

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3. Section 136(1) of the Companies Act, 1948 (United Kingdom).

4. Section 14(a) provides: It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

5. Jenkins Report, Para. 467.

proxy should be required to be forwarded to shareholders at the time of calling shareholders' meetings.

Form of Proxy

6.10 The decision of Spence, J. in *Garvie v. Axmith et al.*[6] suggests that the use of a form of proxy with the names of management nominees printed therein "without the supply at the same time by the company of a blank form of proxy" is not good corporate practice. In view of this decision, management of an Ontario company may consider it prudent to furnish shareholders with a form of proxy enabling the shareholder to appoint a nominee of his choice. However, the Committee believes that this practice should be made a definite requirement of law.

6.11 The Committee, therefore, recommends that the law should require that a proxy be designed to afford to the shareholder the right to appoint as his nominee a person or persons other than those designated by management or by others by whom the proxy is solicited. To avoid as far as possible invalidation of proxies by shareholders exercising in an erroneous manner the right to appoint nominees of their own choosing, the Committee also recommends that the form of proxy include clear instructions as to the manner by which a shareholder may exercise this right.

6.12 It can be argued that furnishing a form of proxy which gives to shareholders whose proxies are being solicited the opportunity of appointing a nominee other than those persons (presumably management nominees) named in the proxy affords shareholders an adequate means of exercising their voting rights. Since the proxy is, or can be, the most effective means whereby individual shareholders can make their views known to management, it follows that the form of proxy should be designed to afford to shareholders the maximum effective means of exercising their franchise. In this connection The Toronto Stock Exchange stated in its brief to the Committee:

> "The form of proxy frequently restricts most severely the instructions the shareholder may give his appointee, particularly where several matters are to be voted upon and there is no provision for a 'for' or 'against' voting on each matter. The vote, in these circumstances, is either a vote for management, or the vote is lost!"

6.13 The "for or against" proxy is designed to permit the shareholder to indicate his approval or disapproval of various matters to be voted upon without the necessity of attending the meeting in person and without requiring him to appoint, presumably by the use of some other form of proxy, a nominee other than those specified in the proxy forwarded to him. One of the most important requirements of Rule 14a-4 of Regulation 14 under the Securities Act of 1934[7] is the necessity of providing in the form of proxy means whereby the person solicited is afforded an opportunity to specify a choice between approval or disapproval of each matter or group of related matters referred to in the form of proxy as intended

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6. [1962] O.R. 65 at 77.
7. Rule 14a-4 is reproduced in Appendix F.

to be acted upon, other than "elections to office." The Jenkins Report contains a recommendation as to proxy forms not dissimilar to that prescribed by Regulation 14 except that the for or against proxy is suggested only in the case of each resolution dealing with special business to be transacted at the meeting for which the proxy is solicited.[8]

6.14 The Committee recommends the adoption of a form of proxy:

(a) which provides means whereby the person solicited is afforded an opportunity to specify by ballot a choice between approval or disapproval of each matter or group of related matters referred to therein as intended to be acted upon, other than the election of directors and the appointment of auditors; and

(b) which indicates in bold face type whether or not the proxy is solicited on behalf of management.

The form of proxy or the information circular hereinafter referred to may, by its terms, confer (i) discretionary authority with respect to matters as to which a choice is not specified by the person solicited, provided the form of proxy states in bold face type how it is intended to vote the shares represented by the proxy in each such case; and (ii) discretionary authority with respect to other matters which properly come before the meeting with no advance notice. The form of proxy or the information circular shall provide that the shares represented by the proxy shall be voted at the meeting in accordance with the specifications made, subject to the further recommendation in Paragraph 6.16.

6.15 The adoption of these recommendations would bring about a significant change in the manner of conducting meetings of shareholders. Shares represented by proxy at a meeting cannot be voted on a show of hands. If the law is to provide that shares held by shareholders who have directed a vote for or against a particular matter by specification in the proxy must in fact be voted at a meeting, in most, if not all, instances voting at meetings of shareholders would have to be effected by recorded ballots rather than by voting on a show of hands. This inconvenience is the price of introducing in the proxy form means whereby shareholders can require their proxies to be voted for or against certain matters to be acted upon at the meeting.

6.16 The Committee recognizes that if provision is made in proxy forms to permit shareholders to direct their nominees to vote in respect of certain matters to be acted upon at the meeting in the manner designated by the shareholder, instances will occur where shareholders exercise this right without due thought. Shareholders, given the opportunity of exercising discretion, will in some cases direct their nominees to vote against certain matters to be acted upon without appreciating that their shares must be voted at the meeting even though the number of such shares represents an insignificant percentage of the outstanding shares entitled to vote at the meeting. In order to avoid unnecessary balloting at meetings of shareholders, the Committee recommends that in cases where the number of shares represented by proxies required to be voted against a particular matter or group of matters is, to

8. Para. 468(h).

the knowledge of the chairman of the meeting, less than five per cent of the outstanding shares entitled to vote and represented at the meeting, the chairman of the meeting shall have the discretion not to conduct a vote by way of ballot on any such matter or group of matters unless a poll is demanded at the meeting.

Information to be Furnished to Shareholders

6.17 In considering what information management of a company should make available to shareholders at the time of calling meetings of shareholders, the Committee was impressed by the following statement of Professor Louis Loss.[9]

> "The proxy literature, unlike the application for registration and the statutory reports, gets into the hands of investors. Unlike the Securities Act prospectus, it gets there in time. It is more readable than any of these other documents. And it gets to a great many people who *never* see a prospectus. Moreover, there are indications in both management and judicial attitudes that the indirect influence of the proxy rules, through their infiltration of the general law of notice to security holders, may in the long run be more significant than their direct impact."

6.18 Section 14 (a) of the Securities Exchange Act of 1934 provides that it is unlawful for a person to solicit a proxy from shareholders of certain companies in contravention of such rules and regulations as the S.E.C. may prescribe "as necessary or appropriate in the public interest or for the protection of investors". Under the authority of section 14, the S.E.C. has promulgated Regulation 14 with some eleven rules, together with Schedule 14A which specifies 21 items of information which must be set out in a proxy statement. The proxy statement, which contains full information of the matters proposed to be brought before the shareholders' meeting by management, is forwarded to shareholders along with the form of proxy. The S.E.C. recently described the proxy rules as ". . . the single most effective disclosure device in our whole statutory arsenal".[10]

6.19 Essentially, the proxy rules as formulated by the S.E.C. are designed ". . . so as to make the proxy device the closest practicable substitute for attendance at the meeting."[11] The Committee agrees with the approach of the United States legislation and, further, adopts the statement contained in the brief of The Toronto Stock Exchange that ". . . the lack of adequate proxy legislation has been revealed as a serious deficiency in our securities regulation machinery".

6.20 In the United States, shareholders are assured of receiving relevant information by the statutory requirement of forwarding a proxy statement at the time proxies are solicited. It is the view of the Committee that Ontario should adopt certain statutory requirements comparable to those in Regulation 14 of the Securities Exchange Act of 1934.

6.21 The Committee therefore recommends that, if management solicits proxies for use at any meeting of shareholders, information be furnished to shareholders prior to any such

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9. Loss, *Securities Regulation* (2nd ed.) Vol. II, p. 1027.
10. Report of Special Study of Securities Markets, Part 3, p. 12.
11. Loss, *Securities Regulation* (2nd ed.) Vol. II, p. 869.

meeting in a document to be known as an "information circular" which should be provided either as an appendix to, or as a separate document accompanying, the notice of the meeting or, in the case of solicitation of proxies by a person or group of persons other than management, as part of the material by which the solicitation is made.

6.22 The Committee recommends that the prescribed contents of the information circular where proxies are solicited by management, should be substantially in the form set out in Appendix E. If proxies are solicited by persons other than management, the prescribed contents of the information circular should be substantially similar to those of Schedule 14B of Regulation 14 under the Securities Exchange Act of 1934 (except for the omission of a counterpart of Item 2(d)) with appropriate changes in terminology[12] and should incorporate the relevant provisions of Schedule 14A.

6.23 The Committee further recommends that provision should be made for general instructions as to the presentation of information in the information circular. The provisions in Rule 14a-5 of Regulation 14[13] should be a helpful guide in preparing such general instructions.

Proxy Solicitation

6.24 The Committee considered the difficult question as to whether the solicitation of proxies by management should be mandatory. If proxies are not solicited, the shareholder will, in large part, have no adequate voice in the affairs of the company. The management of most large or well established public companies in Canada does, in fact, solicit proxies for annual or special meetings of shareholders. The Committee recommends that the solicitation of proxies by the management of all public companies be made mandatory. This will also accomplish the objective of ensuring that shareholders receive, prior to the meeting, the recommended information circular containing, among other things, sufficient information on the matters to be voted upon to enable them to cast their votes for or against the particular proposals. The costs involved to companies in preparing and furnishing proxies and information circulars will be justified by the wider dissemination of corporate information which will thus be made available to the public.

Exemptions and Sanctions

6.25 The Committee recognizes that there may be circumstances in which it is not appropriate or useful to require the mandatory solicitation of proxies or the furnishing of an information circular at the time of solicitation of proxies. We suggest, therefore, that exemptions from the recommended requirements of the legislation as to mandatory solicitation of proxies and furnishing of information circulars could be effected by way of application made to a judge of the Supreme Court of Ontario designated in a manner similar to that prescribed in section 74 of the Companies Act (Canada). Notice of any such application should be given to the Ontario Securities Commission, which should have the right to appear and be heard.

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12. Schedule 14B is reproduced in Appendix F.
13. Rule 14a-5 is reproduced in Appendix F.

6.26 The Committee does not recommend that the information circular be required to be filed with or reviewed by any governmental agency before it is forwarded to shareholders. The legislation should therefore provide penalties and sanctions for non-compliance adequate to ensure that the information circular requirements are complied with. In brief, the legislation should make it an offence:

(a) to fail to send out an information circular;

(b) to fail to include in the information circular appropriate answers to all the applicable items in Appendix E;

(c) to make any statement in an information circular which is false or misleading with respect to any material fact; and

(d) to omit to state any material fact necessary in order to make any statement included in an information circular not false or misleading.

Recommended Legislative Changes

6.27 As a means of ensuring that the recommendations of the Committee in this Part as to the form of proxy, the information circular and the mandatory solicitation of proxies by management are made applicable to all public companies incorporated under the laws of Ontario and, to the extent appropriate, to all companies, wherever incorporated, distributing securities in Ontario or listed on The Toronto Stock Exchange, the following is proposed.

(a) Appropriate amendments embodying such recommendations should be made to The Corporations Act.

(b) The Ontario Securities Commission should be empowered, by amendment to The Securities Act, to require written undertakings from companies, wherever incorporated, at the time of filing under the Act prospectuses relating to the sale of securities in Ontario, to comply with the Committee's recommendations as to the form of proxy, the information circular and the mandatory solicitation of proxies by management, with the effect that in the case of companies which have sold in Ontario (directly or through underwriters) by means of such prospectuses, shares or obligations convertible into shares, such companies shall, so long as any of the shares or obligations are outstanding, or until released by the Ontario Securities Commission from such undertakings, be required to comply with the provisions of The Corporations Act (as to be amended) with respect to the form of proxy, the information circular and the mandatory solicitation of proxies by management.

(c) The Securities Act should be amended by adding thereto provisions requiring companies referred to in sub-paragraph (b) hereof to comply with the provisions of The Corporations Act (as to be amended) as to the form of proxy, the information circular and the mandatory solicitation of proxies by management.

(d) The Securities Act should be amended to require The Toronto Stock Exchange to compel companies listed thereon to comply, in appropriate cases, with the provisions of The Corporations Act (as to be amended) with respect to the form of proxy, the information circular and the mandatory solicitation of proxies by management.

(e) The Securities Act should be amended to require that any person or group of persons soliciting proxies relating to companies referred to in sub-paragraphs (b) and (d) hereof from residents of Ontario be required to comply, in appropriate cases, with the provisions of The Corporations Act (as to be amended) with respect to the form of proxy and the information circular.

(f) The Securities Act should be amended to provide that, in the event of the failure of a company to comply with the provisions of The Corporations Act (as to be amended) with respect to the form of proxy, the information circular and the mandatory solicitation of proxies by management or the failure of a company to observe any undertaking given in accordance with the provisions of sub-paragraph (b) hereof or the failure of a company to comply with the provisions of The Securities Act (as to be amended) referred to in sub-paragraph (c) hereof, the Ontario Securities Commission in its discretion may refuse to accept for filing a prospectus of any such company.

Voting of Shares in Names of Nominees

6.28 The brief submitted to the Committee by The Toronto Stock Exchange states:

> "Management may retain effective control of a company through ownership of a relatively small number of shares by obtaining proxies from nominees or 'street names' without the knowledge of the beneficial owners, or without being accountable to them."

This practice is particularly prevalent with speculative mining companies and other companies which do not pay regular dividends (the payment of which encourages the registration of shares in the names of the beneficial owners). The continuance of this practice is not justified and the Committee therefore recommends that the voting of shares by way of proxy or otherwise which are registered in the names of nominees who are registrants under The Securities Act be restricted in the following manner:

(a) such registrants should be required, if the management of companies or other persons soliciting proxies pay the expenses or give satisfactory evidence that such expenses will be paid, to forward to all persons known by the registrants to be the beneficial owners of shares registered in the names of the registrants or their nominees, copies of all notices of meetings, financial statements, information circulars and other material received by them in connection with any meeting of shareholders together with

(i) a request for voting instructions and a statement to the effect that if instructions are not received 48 hours prior to the time proxies must be deposited with the company, as specified in the notice calling the meeting for which the proxy is to be used and, if not so specified, 48 hours prior to the time fixed for holding the meeting, the proxy may be given or the shares otherwise voted at the discretion of the shareholder of record, or

(ii) a signed proxy which the beneficial owner may or may not give and which he may

fill out as he deems appropriate, indicating the number of shares held as nominee for such beneficial owner, accompanied by a letter informing the beneficial owner of the necessity of completing the proxy and forwarding it within the time specified (if any) to the address indicated in the notice calling the meeting in order that the shares may be represented at the meeting;

(b) such registrants should be required to vote or give a proxy for shares in respect of which the registrants have received specific voting instructions from the beneficial owner;

(c) such registrants should be required to communicate any voting instructions received from the beneficial owner of any shares, certificates for which are in their possession, to the registered owner of such shares, if such registered owner is a registrant; and

(d) no such registrants shall give proxies or otherwise vote shares registered in their names or their nominees, and not beneficially owned by the registrants, unless voting instructions have been requested, as referred to above, and no such instructions have been received prior to 48 hours before the time proxies must be deposited with the company as specified in the notice calling the meeting for which the proxy is to be used or if not so specified, 48 hours prior to the time fixed for holding the meeting, and provided that such registrants have no knowledge of a contest as to action proposed to be taken at the shareholders' meeting and provided that any proposed action does not involve a merger, consolidation, amalgamation, compromise or arrangement or any other matter substantially affecting the rights or privileges of the holders of such shares.

To implement these suggestions, the Committee recommends appropriate amendments to The Securities Act requiring persons or corporations registered thereunder as registrants, in any of the defined categories, to comply with these recommended procedures.

PART VII

PRIMARY DISTRIBUTION THROUGH THE FACILITIES OF THE TORONTO STOCK EXCHANGE

The Existing System

7.01 A brief description of the existing system of primary distribution of shares through the facilities of The Toronto Stock Exchange is necessary to an understanding of this Part. Primary distribution through a stock exchange is, perhaps, now unique to Canada. It consists of the offering, through underwriter-optionees, of treasury shares which are listed on the Exchange directly to the public through the medium of the Exchange. The public purchases shares by placing orders with brokers, who execute these orders on the floor of the Exchange at the prices prevailing from time to time. This operation is confined to the offering of certain speculative mining and oil securities. Primary distribution of industrial securities is conducted off the Exchange, generally by means of a firm underwriting at a fixed price or by a rights offering subject, where applicable, to the prospectus provisions of The Securities Act. Such industrial securities, which term is used to include shares of mature mining and oil companies, are not listed on the Exchange until primary distribution is completed.

7.02 Initial capital for exploration by an unlisted mining or oil company may be raised through a promoter by a distribution of shares in the over-the-counter market. A prospectus is prepared and filed with the Ontario Securities Commission and the shares are then sold to the public through brokers or broker-dealers registered under The Securities Act. Up to this point, the company will have no connection with the Exchange. If, as a result of exploration, the company has ore indications of sufficient tonnage and grade as shown by diamond drilling or other methods to justify additional exploration for the purpose of deciding on a programme of underground development work and otherwise meets the listing requirements of the Exchange, an application can be made for a listing of the company's shares. If the application for listing is accepted by the Exchange all the authorized capital, including the capital then unissued, is listed. Subsequently, if the company wishes to raise further funds it can do so by means of a primary distribution on the floor of the Exchange. The only condition precedent to such a primary distribution is that the Exchange must give its approval by the acceptance of a filing statement, including the terms of the underwriting, reviewed by a committee of the Exchange.

7.03 The procedure described in Paragraph 7.02 is in many cases not followed because promoters frequently do not incorporate and seek a listing for a new company to exploit a property; rather they find it more expeditious to acquire a so-called "shell company", which is already listed, to which the property is then transferred. There are a large number of these dormant or inactive companies listed on The Toronto Stock Exchange, control of which can be acquired by the promoter either in a negotiated purchase of a control block of shares or by purchasing on the floor of the Exchange sufficient shares to constitute actual or effective control. Since the principal asset of these companies is often the listing itself, the acquisition cost

is not normally substantial. Such a company, since it is already listed, may then proceed to primary distribution by filing with the Exchange a filing statement, as described in Paragraph 7.02, notwithstanding that a new company in similar circumstances could not then meet the initial listing requirements of the Exchange. Thus, capital could be raised by the shell company, through primary distribution on the Exchange, for completely speculative exploration enterprises without the above-mentioned requirement, essential for initial listing, as to indications of grade and tonnage of ore.

7.04 A typical underwriting agreement between the promoter and the company involves the purchase of a block of shares coupled with options to "take-down" (i.e., to purchase) additional blocks of shares at successively higher prices. The initial block is purchased at a price which is normally somewhat less than the then market price and, in any event, not lower than ten cents, while the options are at prices having a spread of a few cents between each optioned block.

7.05 Before the underwriter enters into an underwriting agreement, he usually engages in an activity described as "conditioning the market". This usually involves, among other things, buying a number of the available low-priced shares of the particular company. The promoter thereby achieves a fourfold purpose: he creates interest in the issue; he is able to estimate the price level at which he may be able to dispose of his shares; he reduces the floating supply of shares available for sale when the distribution of treasury shares commences; and he acquires inexpensively purchased shares which are available for sale by him along with the treasury shares.

7.06 After signing the underwriting agreement, but before the acceptance by the Exchange of the filing statement, the underwriter will often engage in "selling short against the deal" in anticipation of the Exchange approval. This, with concurrent purchases, creates an appearance of active trading and induces public interest in the stock. Short selling at this point tends to keep the underwriting price accepted by the Exchange at a low level.

7.07 The actual distribution of the promoter's stock through the facilities of the Exchange is a complex matter.[1] The underwriter regulates the market—to use a neutral term—which activity involves the sale and purchase of shares at various prices. This regulation or running of the market sometimes involves purchases by the promoter which are designed to have the effect of raising the price. Both before and after the acceptance of the filing statement the underwriter is at liberty to sell his "free" stock.[2] At all times he is at liberty to sell short against the firm underwriting and the options. There is no maximum price at which this stock can be sold as there is in the over-the-counter market. In the latter market, a price-spread, established by the Broker-Dealers' Association of Ontario limits the maximum sale

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1. The complexity of a securities distribution through an exchange will no doubt be demonstrated by the enquiries of the Ontario Royal Commission on Windfall Oils & Mines Limited being conducted by Mr. Justice Arthur Kelly.
2. It is the practice of the Exchange to require that a percentage of the shares acquired by a vendor in the sale of property to a company be placed in escrow. The vendor cannot deal with these shares without the approval of the Exchange. Free shares include vendor's shares not in escrow and shares acquired otherwise than from the sale of property to the company.

price of the shares. There is, however, a rule on the Exchange which accelerates the time when options must be exercised in the event of advances in market price and volume of trading in the shares of the company concerned. The Toronto Stock Exchange in its brief to the Committee pointed out that the acceleration rule ". . . is designed to permit the treasury of the company to benefit from a favourable market". In addition, the Exchange requires its members who are distributing the stock for the underwriter (or who are the underwriters themselves) to try to control excessively wide fluctuations in the market price of the shares.

Objections to the Existing System

7.08 The Committee is opposed to the system of distributing securities through the facilities of the Exchange, as it is practised in Ontario at the present time. Inherent in the existing system are the dangers, among others, of market manipulation, false rumours, artificial excitement and inside advantages by promoters, brokers and floor traders. Coupled with this is a virtually complete lack of knowledge by the public of the fact that primary distribution is taking place; most people regard a stock exchange as a place where the trading is confined to shares already issued and distributed and where transactions are effected among bona fide sellers and buyers. There is no real disclosure of material facts made to the buyer of speculative securities in this type of primary distribution. For these reasons, primary distribution on the Exchange is inconsistent with a free market.

7.09 One of the Committee's principal concerns with the existing system is the ease of price manipulation which accompanies this form of primary distribution. The option system certainly encourages manipulation, but even if the use of progressive options were abandoned certain of the undesirable marketing features would still persist. Among the objectionable techniques employed by the promoter are the artificial creation of activity by purchase and sale of securities, the artificial raising of the price, false rumours, inaccurate newspaper reports and other like activities—not to mention the cruder devices such as "wash trading" (a means, in effect, whereby the promoter buys and sells without any change in beneficial ownership) which is an offence under the Criminal Code.[3] The Toronto Stock Exchange noted in its brief to the Committee:

> "As the assets of the companies are represented by property rights having no economic value until proven, their speculative value is subject to violent changes as the result of such factors as drill-hole results, announcement of mineral values found on neighbouring properties, etc. News concerning properties is the basis of tips, rumours and trading by promoters, drill-hole operators, engineers, etc. By the same token these 'tips' can be generated by false rumours, and other improper attempts to affect the market price."

7.10 All transactions taking place on the Exchange are recorded on the ticker tape, a procedure which results in a wide dissemination of information as to prices and activity. Making the transactions known to the public by means of the tape facilitates many of the

3. Canadian Criminal Code s. 325.

methods of manipulation. There is no indication on the tape whether the promoter is a party to the trade; it only records and shows the transaction itself. While many forms of manipulation can take place on a stock exchange, whether primary distribution is permitted or not, it is clear that the present form of primary distribution through The Toronto Stock Exchange accentuates the problems. There is necessarily someone in the centre of the distribution activity who has a clear and decided interest in the trading, normally the promoter or his agent—in the language of the trade, the person with the "box"—who may (and usually does) control a large proportion of the available free shares.

7.11 When primary distribution takes place through the facilities of the Exchange, no prospectus is required to be filed with the Ontario Securities Commission. Section 41 of The Securities Act exempts such distribution from the prospectus provisions of the statute. Even if a prospectus were required to be filed, it would be virtually impossible to get the prospectus into the hands of purchasers by reason of the mechanics of trading on a stock exchange. The filing statement procedure previously described constitutes at least partial disclosure of facts material to the deal, but the filing statement is not delivered to purchasers and, indeed, is not widely distributed.

7.12 It has been stated that the filing statement technique is advantageous because of the speed with which the filing statement is processed. However, accurate and clear disclosure should not be sacrificed to speed of distribution. While speed in bringing an issue to market may be in the interests of the promoter and the issuing company, it is by no means certain that it is in the interests of the public. Further, the members of the Exchange Committee who review filing statements are themselves brokers who may deal in such speculative securities, thereby creating a potential conflict of interest. A further objection is that the penalties provided in The Securities Act for mis-statements or omissions in a prospectus are not applicable to the filing statement. Thus, apart from deliberate fraud, which is very difficult to prove, there is little prospect of redress on behalf of the public arising out of mis-statements or omissions in the filing statement.

7.13 Members of the Exchange, and in particular floor traders, have a decided trading advantage over the general public. They are in a position to watch and anticipate price movements much more easily than persons who depend upon the tape for information. This is particularly true in times of feverish activity when the tape tends to fall behind the trading. Feverish activity often accompanies primary distribution. There are only limited restrictions against member houses trading on their own account and the Exchange exercises limited control over the extent of personal or house trading by floor traders.

7.14 The existing system of primary distribution thrives on the traffic in the dormant or inactive company (the shell company). There is no justification in the public interest for the trading in the control of these corporate shells which now takes place. The Exchange's rules applicable to these companies are not sufficiently strict; shell companies do not deserve the stamp of reputability attached to an Exchange listing. It is not possible to justify a listing system which has relatively high initial listing requirements, yet which permits a shell company to enter into financing arrangements through the facilities of the Exchange for the

purpose of speculative exploration on unproven property and generating trading profits for promoters and underwriters. It should also be kept in mind that the old shareholders get an undeserved "free ride" in these cases at the expense of the new shareholders. The Toronto Stock Exchange stated in its brief:

> "The low price of these securities contributes to the fact that effective control of a company with the aid of proxy solicitation, can be attained by risking of only a small amount of money. Underwriting payments are also correspondingly small. It is therefore possible for newcomers of unproven and minimal resources to enter the field as promoter-underwriters. For the Exchange to be discriminatory as to persons is difficult, if not undesirable. The presence of these practices and these types of people, coupled with the high risks which are inherent in an underwriting and in the development of a mine leads to a low ratio of success in mining ventures. All these circumstances result in a high cost of raising risk capital with little chance of creating a profitable mine."

7.15 The Committee has concluded that the existing procedure of primary distribution harms the Exchange and indeed the entire securities industry in Canada. Public confidence is seriously impaired by the effect on the reputation of the Exchange caused by these procedures of distributing speculative securities. It may be that in earlier times the Canadian economy required that the speculative mining and oil companies should enjoy a decided advantage over industrial companies with respect to the method of raising funds from the public. There is less need today for this form of advantage to be given to such speculative companies.

Practices Followed in Other Jurisdictions

7.16 We are supported in our conclusion as to the undesirability of the system of primary distribution through the facilities of the Exchange presently existing in Ontario by the fact that this method of distribution of securities does not take place either in England or the United States.

7.17 In England, primary distribution on the Exchange as it exists in Canada would appear to have been effectively eliminated in 1892 following the case of *Scott v. Brown*[4] which, in effect, held that techniques similar to those generally employed in Canada to effect a primary distribution on an exchange are, in fact, illegal and probably constitute the common law criminal offence of conspiracy to defraud. The headnote of *Scott v. Brown* reads as follows:

> "An agreement between two or more to purchase shares in a company in order to induce persons who might thereafter purchase shares in such company to believe, contrary to the fact, that there was a bona fide market for its shares, and that the shares were at a real premium, is an illegal transaction and may be made the subject of an indictment for conspiracy, and no action can be maintained in respect of such agreement or purchase of shares."

Lindley L. J. made the following observations in his reasons for judgment:

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4. [1892] 2 Q.B. 724.

> "In this case the correspondence put in evidence by the plaintiff in support of the claim he made at the trial shews conclusively that the sole object of the plaintiff in ordering shares to be bought for him at a premium was to impose upon and to deceive the public by leading the public to suppose that there were buyers of such shares at a premium on the Stock Exchange, when in fact there were none but himself. The plaintiff's purchase was an actual purchase, not a sham purchase; that is true, but it is also true that the sole object of the purchase was to cheat and mislead the public. Under these circumstances, the plaintiff must look elsewhere than to a court of justice for such assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal contract . . . . I am quite aware that what the plaintiff has done is very commonly done; it is done every day. But this is immaterial. Picking pockets and various forms of cheating are common enough, and are nevertheless illegal. The plaintiff was not entitled to judgment in the Court below, and he has no right to a new trial."

The practice described in the judgment was apparently common before that time. As Lindley L. J. stated, what was done in that case "is very commonly done; it is done every day." In 1893, the editor of the Law Quarterly Review, Sir Frederick Pollock, in a very brief note on the case stated[5] that the scheme was ". . . much favoured by company promoters who are floating a company, for deluding the public into thinking there is a bona fide market for the shares." As a result of the decision in that case the London Stock Exchange expelled the defendants for "dishonourable conduct".[6] It follows that if an Ontario Court applied the principles of *Scott v. Brown*, contracts made between the principals to carry out a primary distribution on the floor of the Exchange would probably be determined to be unenforceable.

7.18 Primary distribution through stock exchanges in the United States was effectively eliminated by the exchanges themselves and by state laws after the stock market crash in 1929—even before the enactment of the Securities Act of 1933 and the Securities Exchange Act of 1934. "It is of the essence of the economic function of a securities exchange" wrote Professor Loss "that it be a free market".[7]

Recommendations

7.19 The Committee recommends that primary distribution through the facilities of The Toronto Stock Exchange be discontinued. Implementation of this recommendation will have significant consequences. Much of the financing of companies engaged in highly speculative mining and oil ventures would shift to the over-the-counter market. A transitional period should therefore be provided to give the securities industry time to make any necessary adjustments and to give the Ontario Securities Commission time to formulate

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5. (1893) 9 L.Q.R. 105.
6. A report of the proceedings in which the defendant Brown unsuccessfully attempted to enjoin the Exchange appears in the Solicitors' Journal, 1892, at p. 752.
7. Loss, *Securities Regulation* (2nd ed.) Vol. III, p. 1531.

draft regulations to control and strengthen the procedures and practices in the over-the-counter market. See Paragraph 7.21. It is therefore the view of the Committee that, if its recommendation to remove primary distribution from the Exchange is implemented by legislation, such legislation should provide that it shall come into effect within two years after the date of its enactment.

7.20 The removal of primary distribution from the Exchange would not prevent a company from engaging in primary distribution in the over-the-counter market at a time when its issued shares are traded on the Exchange. In this situation, there could be two markets operating at the same time. This could lead to many of the abuses which occur when primary distribution takes place through the Exchange. It may, accordingly, prove to be necessary to require that, during the period when shares of a company are in the course of primary distribution in the over-the-counter market, trading through the facilities of the Exchange in any shares of the company of the same class be suspended from trading on the Exchange.

7.21 The Committee has referred above to some of the improprieties and abuses which can and do occur when shares are distributed to the public by primary distribution through the facilities of the Exchange. Many of these improprieties and abuses, particularly those relating to manipulation, are not unique to primary distribution on the Exchange; they will continue to exist if primary distribution is removed from the floor of the Exchange. In this connection, the Criminal Code contains provisions making certain manipulative stock transactions an offence. These anti-manipulative provisions fall short of what is required to protect the investing public, particularly if financing in the over-the-counter market is to increase in volume as the result of our recommendations. The Committee has concluded that the highly specialized and complex problems of market manipulation in all its phases should be the subject of a special study to be carried out by the Ontario Securities Commission. The Committee recommends that this study be undertaken without delay so that its results can be embodied in appropriate implementing legislation prior to the date when primary distribution through the facilities of the Exchange is effectively discontinued. The study should be made under special grant of funds and should be carried out in the closest possible collaboration with The Toronto Stock Exchange and other interested organizations, such as the Investment Dealers' Association of Canada and the Broker-Dealers' Association of Ontario. Special staff and legal counsel should temporarily be attached to the Commission to facilitate the study.

7.22 In order to facilitate the role of the Ontario Securities Commission in administering those provisions of the law, both existing and recommended, dealing with primary distribution of securities to the public, improved record-keeping by underwriters is desirable. The Committee therefore recommends that underwriters be required to keep adequate records, in form and content approved by the Commission, of all transactions arising in primary distributions of securities in which they participate. This obligation, of course, should extend to sub-underwriters and members of selling groups. The Commission should have authority to inspect such records from time to time and to make and retain copies thereof in order to carry out any of the purposes or provisions of The Securities Act (as to be amended).

7.23 The undesirable effects on primary distribution generally of the acquisition of listed shell companies for use as financing vehicles is commented on in Paragraphs 7.03 and 7.14. This obvious abuse of the Exchange facilities should not be allowed to continue. The Committee refers in Part VIII of the Report to the making of Regulations under The Securities Act to clarify the relationship between the Ontario Securities Commission and The Toronto Stock Exchange. We recommend that these Regulations specifically clarify the Commission's authority to require the Exchange to formulate, without delay, a policy satisfactory to the Commission, of de-listing of and close supervision over the shell companies. Obviously any such policy must contain transitory provisions: for example, the policy could perhaps prescribe that shell companies with tangible assets of a certain minimum value need not be de-listed immediately provided they do not seek public financing to raise funds for their original or any substituted projects. The Committee recommends, however, that the policy be designed to ensure the prompt removal from listing on the Exchange of virtually all truly dormant or inactive companies. We have concluded that the alleged detriment to shareholders of such a de-listing policy is to some extent illusory and, in any event, of lesser importance than the reputation of The Toronto Stock Exchange and the financial community generally.

PART VIII

ONTARIO SECURITIES COMMISSION

8.01 It is appropriate to comment briefly in the Report on the role played by the Ontario Securities Commission in the securities business, although a detailed study of the administrative organization and personnel requirements of the Commission is not within the terms of reference of the Committee.

8.02 There have been occasions in the past when the Commission has been criticized for an apparent lack of organization and efficiency, particularly with respect to the review and filing of prospectuses. For the purpose of the comments which follow it will be assumed that at least some of this criticism has been justified. Even a cursory examination of the structure of the Commission, for example, discloses that the Commission is and has been seriously understaffed. In addition, the Commission has apparently been expected to operate on a self-sustaining financial basis. Consequently, the Chairman and the Commissioners have been handicapped in effecting necessary reorganizations and additions to personnel to make the Commission a more efficient and effective administrative agency.

8.03 The Commission has traditionally been a branch of the Department of the Attorney General, which relationship was clarified by statute in the amendments to The Securities Act in 1962-63. This relationship may have been appropriate when securities legislation was first introduced in Ontario, since the legislation was primarily directed to the prevention of fraud in the sale of securities. However, such relationship is of limited importance today and will continue to be of less importance in the future. The administration of securities legislation should not be directed primarily to criminal and quasi-criminal law enforcement but rather to the enhancement of the position of the securities industry in the economic life of the province.

8.04 It has been traditional that the members of the Commission, other than the Chairman, serve on a part-time basis. One of the Commissioners has frequently been a Master of the Supreme Court of Ontario and another a representative of the Department of Mines. Since the Commission performs important functions which are judicial in nature, the appointment of a Chairman with a legal background has been desirable and should be continued. However, with the increasing complexity of the securities industry and in view of the amendments to securities legislation recommended by the Committee, the Commission would be greatly strengthened by the inclusion of persons who have special skill or experience in matters relating to the securities industry.

8.05 The Committee recognizes that the relationship between the Commissioners and the staff of the Commission and that segment of the public engaged in the various aspects of securities matters has on the whole been co-operative and effective. There is no doubt, however, that, partly for the reasons referred to above, these relationships and the over-all function of the Commission as a governmental agency could have been improved. The Committee wishes to emphasize that many of the recommendations made in this report are predicated upon the assumption that the Ontario Securities Commission will be an expanded,

more adequately staffed and better financed agency, operating in an independent manner as an organization of experts administering revised and more complex securities laws.

8.06 The Committee therefore makes the following recommendations designed to ensure the establishment of a Commission competent to perform the role required by existing and recommended legislation.

1. The Chairman of the Commission, at least, should be appointed on a full-time basis. The additional Commissioners, who should be at least two in number, should be persons knowledgeable in the securities business, whether drawn from investment dealers, brokerage houses or the legal and accounting professions. The compensation of the Commissioners should be commensurate with the important responsibilities of their office.

2. The Commission should be established as an independent administrative agency and not as a branch of the Department of the Attorney General. The Commission would thereby acquire authority to procure and administer its own budget and would report to the Legislature, through a member of the Executive Council, on an annual basis as to its activities in the preceding year and submit its budget requirements for the ensuing year. This suggestion would have the beneficial effect, among others, of permitting the Commission to establish its own job classifications, personnel qualifications and salary ranges for its staff. Without such freedom, it seems doubtful whether the Commission will be able to attract and retain the competent legal, accounting and other personnel it will urgently need.

3. The Commission should engage a full-time Chief Counsel whose function would be to render legal opinions to the Commission, to represent the Commission in major court proceedings and generally to act as legal adviser to the Commission. His duties would not entail day-to-day or routine functions in the registration, investigation or prospectus review procedures.

4. The Chairman and the other members of the Commission, with the assistance and advice of the Chief Counsel, should, if the Commission were otherwise adequately staffed, be free to devote more attention to formulation of policies to be recommended to the Lieutenant Governor in Council for embodiment in regulations to be passed under The Securities Act. Section 72 of the Act has provided reasonably adequate scope for the promulgation of policy regulations, but has not, in the past, been sufficiently resorted to, with the result that Commission policy at the present time is largely a matter of so-called "departmental policy" prevailing from time to time. In our opinion, the policy-making functions of the Commission, especially in the significant areas of primary distribution and jurisdiction over stock exchanges, should be embodied in published regulations. Section 72 and other pertinent sections should be carefully analysed to determine whether the scope of such provisions are adequate to permit the formulation of necessary policies by regulations passed under section 72.

8.07 As a necessary corollary to the above recommendations, the Committee recommends that there be a detailed and thorough examination of the internal structure of the Commission carried out by a non-governmental body experienced in the analysis of business and governmental forms of organization. The Committee believes that such an independent study of the structure of the Commission, integrated with the general recommendations made in this Part, would aid in bringing into existence a Commission competent to discharge the increased responsibilities which will be imposed upon it by the adoption of the recommendations advanced in this Report.

PART IX

CONSTITUTIONAL CONSIDERATIONS[1]

Limitations

9.01 In framing its recommendations, the Committee has taken account of constitutional limitations on provincial legislative authority under the British North America Act. These limitations must be kept in view in the drafting of any legislation to implement the recommendations. The limitations arise, in the main, from the territorial restriction on all provincial law-making power, and from the interprovincial and, indeed, international character of the securities industry. There is, in addition, a special limitation that affects some of the Committee's recommendations in respect of the securities and internal operation of companies incorporated under Federal legislation. It will be useful to point out, briefly, how these limitations operate with respect to matters within the Committee's terms of reference.

9.02 Ontario securities legislation has been in substance regulatory, in conformity with the Court decisions that have defined the scope of provincial power in this area. This has not prevented the imposition of penal sanctions in support of the regulatory provisions, notwithstanding the fact that exclusive power in relation to criminal law is reposed in the Government of Canada, which has, within the scope afforded by such power, created offences to protect the public in certain aspects of security trading. Federal criminal law is not directly regulatory, nor is civil liability within its purview, and it is here that provincial legislation can be effective.

Ontario Companies

9.03 Provincial regulatory authority is fortified by the control exercisable by a provincial Legislature over companies incorporated under its auspices. Shareholder relationships and directors' duties, either to the company or to its existing or prospective shareholders, are subject to definition and prescription by such Legislature regardless of the place of residence or domicile or nationality of the shareholders and directors. The competence of the Legislature is complete with respect to the constitution and operations of companies that it has created. If there be any area, for example, contracts for the purchase and sale of securities of Ontario companies made outside the Province, which is, as such, beyond direct provincial regulation, effective control still remains over the transfer of such securities on the books of the company in the Province.

Extra-Provincial Companies

9.04 Extra-provincial companies (companies incorporated under Federal legislation are excluded from consideration in this Paragraph) do not enjoy any special constitutional

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1. The Committee is indebted to Professor Bora Laskin of the Faculty of Law, University of Toronto, for the assistance he gave to the Committee in its consideration of the constitutional aspect of provincial securities legislation.

position in this or any other Province. They are subject to its laws with respect to any security trading that takes place in this Province, and there is additional control in the Province's jurisdiction over residents of Ontario who deal in securities of extra-provincial companies. Directors or officers of extra-provincial companies, wherever resident, may be required to conform to the security laws of the Province if they seek to raise capital or engage in secondary trading therein. Although they may ultimately be beyond personal reach of provincial law, undertakings may be exacted from them as a condition of enjoying access to the capital market in Ontario and they may be required to account for their extra-provincial actions on pain of withdrawal of the privileges or facilities provided by Ontario law.

9.05 Although Ontario law cannot directly interfere in the internal operations of extra-provincial companies, for example, in regulating proxy solicitation or in controlling shareholder relationships, it can deal with these and other matters indirectly through the imposition of conditions or the requirement of undertakings if such companies or their directors seek access to the Ontario capital market to raise money or engage in trading in Ontario. Moreover, transactions that take place in the Province are, of course, subject to its laws regardless of who the transacting parties are. On these bases, information requirements and reporting obligations may be enforced in nearly as full a fashion as in the case of Ontario companies. The territorial limitation on provincial legislation prevents Ontario from dealing with the validity of share transactions of extra-provincial companies concluded outside the Province, but it has sufficient leverage for its purpose of protecting the investor in Ontario through its control of the security trading facilities offered in Ontario.

Listed Companies

9.06 Additional control over both Ontario and extra-provincial companies and over security traders resides in the Legislature's power to impose conditions for the listing of securities on The Toronto Stock Exchange or to require the Exchange to impose them. Transactions on the Exchange can be regulated, whether initiated by residents or non-residents, but Ontario itself would be powerless to deal with any extra-provincial consequences in so far as they involved persons beyond the territorial reach of the Province. This is, however, a disability which operates in all regulatory fields entered by a Province, and would not reflect any particular weakness of security regulation.

Federal Companies

9.07 Although companies incorporated under Federal legislation may be required to conform to provincial securities legislation even in respect of primary distribution so long as such distribution is reasonably open to them, such companies pose difficulties in respect of provincial competence to enforce proxy rules or regulate shareholder-director relationships or deal with conflict of interest issues. In these respects, the position is similar to that of other extra-provincial companies, and Ontario may properly put Federal companies under similar obligations of disclosure and reporting, and may impose conditions or exact undertakings as a condition precedent to access to marketing and listing facilities in Ontario.

The difference between Federal and other extra-provincial companies so far as concerns the application of Ontario securities legislation lies in the possible conflicting terms of Federal corporation legislation which would be entitled to paramountcy in such case. Careful drafting, however, can overcome the difficulties or at least reduce them to the point where they do not substantially impair the effectiveness of the extension of Ontario's regulation of the securities industry as recommended by the Committee.

APPENDIX A

Organizations and Individuals who Submitted Briefs to the Committee

1. Alberta Securities Commission.
2. C. Roger Archibald, Q.C.
3. The Board of Trade of Metropolitan Toronto.
4. The Broker-Dealers' Association of Ontario.
5. Canadian Bar Association, Ontario Section, Commercial Law Subsection, Committee on Securities Legislation.
6. The Canadian Life Insurance Officers Association.
7. The Canadian Mutual Funds Association.
8. Financial Times of Canada (Michael Barkway, Publisher).
9. David Grenier.
10. The Institute of Chartered Accountants of Ontario.
11. The Investment Dealers' Association of Canada, Ontario District Executive Committee.
12. The Life Underwriters Association of Canada.
13. Messrs. McCarthy & McCarthy.
14. Ontario Federation of Labour.
15. Pope & Company.
16. Nathan L. Sandler.
17. Elmer W. Sopha, Q.C., M.P.P.
18. The Toronto Society of Financial Analysts.
19. The Toronto Stock Exchange.
20. United Accumulative Fund Ltd.

APPENDIX B

Proposed Provisions of The Securities Act as to Take-Over Bids

Division A—General Provisions as to Take-Over Bids

Division A will contain the definition of a take-over bid and will set out as statutory rules the various recommendations referred to in Part III, such as the 7-14-35 day time limit requirements, the mandatory requirement as to pro rata acceptances, provisions requiring the disclosure of details as to the financial ability of the bidder to take up and pay for shares under a cash basis offer, provisions to ensure that an offeror who subsequently varies the terms of his offer by increasing the price be required to pay the higher price for shares accepted on the initial as well as the amended offer, provisions permitting applications to a judge of the Supreme Court of Ontario for an order exempting a proposed transaction from the take-over bid requirements and, finally, the sanctions and penalties for non-compliance with the various requirements with respect to take-over bids. Such sanctions and penalties should be sufficiently onerous to serve as an adequate substitute for prior review of circulars by a governmental agency. It is suggested that an offeror, the directors of an offeror which is a company, or the directors of an offeree company who have authorized the forwarding of circulars should be liable to penalties for knowingly making material false statements therein in the same manner as that provided in section 64 of The Securities Act.

Division B—Contents of Take-Over Bid Circulars

I. Division B will set out the prescribed contents of the take-over bid circular as follows:

1. the number and designation of any securities of the offeree company beneficially owned, directly or indirectly,

   (a) by the offeror, including, where the offeror is a company, securities so owned by any subsidiary or parent (as defined in Appendix C of this Report) of such company,

   (b) by each director and each executive officer (as defined in Paragraph 2.07 of this Report) of the offeror,

   (c) and, where known to such directors or executive officers, by each holder of more than ten per cent of any class of equity securities (as defined in Appendix C) of the offeror company,

   or, if none are so owned, a statement to that effect;

2. for the six months preceding the date of the offer, the number and designation of any securities of the offeree company traded, including the purchase price or sale price and the date of each transaction, by the persons designated in the preceding paragraph, where known to such directors or executive officers;

3. if the offer is conditional upon acceptance in respect of a minimum number of shares tendered under the offer, particulars of such condition;

4. particulars of the method and time of payment of the consideration (whether cash or securities) to be paid for the shares sought to be acquired;

5. if an agent is making the offer on behalf of an undisclosed principal, whether or not the agent has taken any steps to ascertain that the undisclosed principal will be in a position to implement the offer if it is accepted by the offerees and, if so, what steps;

6. where the information is reasonably ascertainable, a summary showing, in reasonable detail, the volume of trading and price range, in the six months preceding the date of the offer, of the securities sought to be acquired;

7. particulars of any arrangement or agreement made or proposed to be made between the offeror and any of the directors or executive officers of the offeree company (including particulars of any payment or other benefit proposed to be made or given) as to compensation for loss of office or as to their remaining in or retiring from office, in the event that the offer is successful; and

8. particulars of any information within the knowledge of the offeror which indicates any material change in the financial position or prospects of the offeree company since the date of the last published annual or interim financial statements of the offeree company.

II. Division B should state that, for the purpose of such Division, if an offer is made by or on behalf of an undisclosed principal, such undisclosed principal is to be considered as the offeror for the purposes of compliance with the requirements of Division B.

III. The contents of take-over bid circulars should be approved and the delivery thereof authorized by the directors of the offeror company if the offeror is a company.

IV. If a take-over bid circular contains any report, opinion or statement of an expert, such expert must consent to the inclusion of such report, opinion or statement in the circular and such consent shall be reproduced in the circular.

Division C—Additional Requirements for Share Exchange Take-Over Bid Circulars

I. Division C will set out the prescribed contents of the circular, in addition to the requirements of Division B, to be forwarded to shareholders with or as part of the formal offer being made to them to acquire shares in the offeree company for a consideration consisting in whole or in part of shares of the offeror or any other company. The suggested additional prescribed contents of such circular should comply, with appropriate changes, with the form of prospectus as recommended in Part V.

II. Each take-over bid circular prescribed by Division C is to contain financial statements of the offeror company which shall comply with the requirements for financial

statements to be included in prospectuses as recommended in Parts IV and V of this Report. The circular must contain particulars of any information within the knowledge of the offeror indicating any material change in the financial position or prospects of the offeror company since the date of the last audited financial statements of the offeror company included as part of the circular, giving particulars of any such material change.

Division D—Contents of Directors' Circulars

I. Division D will set out the prescribed contents of the circular required to be forwarded to shareholders of the offeree company by the directors of the offeree company if such directors recommend either acceptance or rejection of the offer made by the offeror. The suggested prescribed contents of such circular are:

1. the number and designation of any securities of the offeree company beneficially owned, directly or indirectly, by each director and each executive officer of the offeree company, and, where known to such directors or executive officers, by each beneficial owner of more than ten per cent of any class of equity securities of the offeree company or, in each case, if none are so owned, a statement to that effect;

2. whether or not each director and each executive officer of the offeree company and, where known to such directors or executive officers, each beneficial owner of more than ten per cent of any class of equity securities of the offeree company has accepted or intends to accept the offer in respect of securities to which the offer relates so owned by him;

3. where the offer is being made or has been made by a company, whether or not any securities of the offeror company are beneficially owned, directly or indirectly, by each director and each executive officer of the offeree company, and, where known to such directors or executive officers, by each beneficial owner of more than ten per cent of any class of equity securities of the offeree company and, if so, the number and designation of such securities so owned by each such person;

4. particulars of any arrangement or agreement made or proposed to be made between the offeror and any of the directors or executive officers of the offeree company (including particulars of any payment or other benefit proposed to be made or given) as to compensation for loss of office or as to their remaining in or retiring from office, in the event that the offer is successful;

5. whether or not any director or executive officer of the offeree company and, where known to such directors or executive officers, any beneficial owner of more than ten per cent of any class of equity securities of the offeree company has any interest in any material contract to which the offeror is a party and, if so, particulars of the nature and extent of such interest;

6. if the securities sought to be acquired are not listed on a recognized stock exchange and the information is reasonably ascertainable, a summary showing in reasonable

detail the volume of trading and price range of such securities in the six months preceding the date of the offer;

7. particulars of any information within the knowledge of the directors or executive officers of the offeree company indicating any material change in the financial position or prospects of the offeree company since the date of the last published annual or interim financial statements of the offeree company; and

8. particulars of any other material facts not disclosed in the foregoing.

II. If a directors' circular contains any report, opinion or statement of an expert, such expert must consent to the inclusion of such report, opinion or statement in the circular and such consent shall be reproduced in the circular.

III. The contents of the circular should be approved and the delivery thereof authorized by the directors of the offeree company.

IV. If a directors' circular contains financial statements of the offeree company, such financial statements shall comply with the requirements for financial statements to be included in prospectuses as recommended in Parts IV and V of this Report.

APPENDIX C

Information Required in Prospectus of Industrial Company

Item 1. Distribution Spread:

The information called for by the following table shall be given, in substantially the tabular form indicated, on the outside front cover page of the prospectus as to all securities being offered for cash (estimate amounts, if necessary).

	Price to Public	Underwriting Discounts and Commissions	Proceeds to Issuer or Other Persons
Per unit	.....	.....	.....
Total	.....	.....	.....

Instructions:

1. Only commissions paid in cash by the issuer or selling shareholders are to be included in the table. Commissions paid by other persons and other consideration payable to the underwriters shall be set out following the table with a reference thereto in the second column of the table. Any finder's fees or similar payments shall be appropriately disclosed.

2. If it is impracticable to state the price to the public, the method by which it is to be determined shall be explained. In addition, if the securities are to be offered at the market, indicate the market involved and the market price as of the latest practicable date.

3. If any of the securities offered are to be offered for the account of existing security holders (secondary distribution), refer on the first page of the prospectus to the information called for by Instruction 3 to Item 17.

Item 2. Plan of Distribution:

(a) If the securities being offered are to be sold through underwriters, give the names of the underwriters. Identify each such underwriter having a material relationship to the issuer and state the nature of the relationship. State briefly the nature of the underwriters' obligation to take the securities.

(b) Outline briefly the plan of distribution of any securities being offered which are to be offered otherwise than through underwriters.

Instructions:

All that is required as to the nature of the underwriters' obligation is whether the underwriters are or will be committed to take up and to pay for all of the securities if any are taken up, or whether it is merely an agency or "best efforts" arrangement under which the underwriters are required to take up and pay for only

such securities as they may sell to the public. Conditions precedent to the underwriters' taking up the securities, including "market outs," need not be described except in the case of an agency or "best efforts" arrangement.

Item 3. Use of Proceeds to Issuer:

(a) State the principal purposes for which the net proceeds to the issuer from the securities to be offered are intended to be used, and the approximate amount intended to be used for each such purpose.

(b) State the particulars of any provisions or arrangements made for holding any part of the net proceeds of the issue in trust or subject to the fulfilment of any conditions.

Instructions:

1. Details of proposed expenditures are not to be given; for example, there need be furnished only a brief outline of any program of construction or addition of equipment. If any substantial part of the proceeds has not been allocated for particular purposes, a statement to that effect shall be made together with a statement of the amount of the proceeds not so allocated.

2. Include a statement as to the proposed use of the actual proceeds if they should prove insufficient to accomplish the purposes set out, and the order of priority in which they will be applied. However, such statement need not be made if the underwriting arrangements are such that, if any securities are sold to the public, it can be reasonably expected that the actual proceeds of the issue will not be substantially less than the estimated aggregate proceeds to the issuer as shown under Item 1.

3. If any material amounts of other funds are to be used in conjunction with the proceeds, state the amounts and sources of such other funds. If any material part of the proceeds is to be used to reduce or retire indebtedness, the item is to be answered as to the use of the proceeds of the indebtedness if the indebtedness was incurred within the two preceding years; otherwise, it will suffice to state that the proceeds are to be used to reduce or retire the indebtedness.

4. If any material amount of the proceeds is to be used directly or indirectly to acquire assets, otherwise than in the ordinary course of business, briefly describe the assets, and where known the particulars of the purchase price being paid for or being allocated to the respective categories of assets (including intangible assets) which are being acquired and, where practicable and meaningful, give the names of the persons from whom the assets are to be acquired. State the cost of such assets to the issuer and the principle followed in determining such cost. State briefly the nature of the title or interest in or to such assets to be acquired by the issuer. If any part of the consideration for the acquisition of any such assets consists of securities of the issuer, give short particulars of the designation, number or amount, voting rights (if any) and other appropriate information relating to such class of securities, including particulars of any allotment or issuance of any such securities within the two preceding years.

Item 4. Sales Otherwise than for Cash:

If any of the securities being offered are to be offered otherwise than for cash, state briefly the general purposes of the issue, the basis upon which the securities are to be offered, the amount of compensation payable to fiscal agents or others and any other expenses of distribution, and by whom they are to be borne.

Instructions:

If the offer is to be made pursuant to a plan of acquisition, describe briefly the general effect of the plan and state when it became or is to become operative. As to any material amount of assets to be acquired under the plan, furnish information corresponding to that required by Instruction 4 of Item 3.

Item 5. Share and Loan Capital Structure:

Furnish the information called for by the following table, in substantially the tabular form indicated, as to each class of securities (other than indebtedness classified as current liabilities) of the issuer, and each such class of securities of each subsidiary, naming them, (other than securities owned by the issuer or its wholly-owned subsidiaries) whose financial statements are contained in the prospectus on either a consolidated or individual basis.

Designation of security	Amount authorized or to be authorized	Amount outstanding as of a specific date within 90 days	Amount to be outstanding if all securities being issued are sold
.....	.....	.....	.....

Instructions:

1. Indebtedness held by or for the account of the issuer thereof is not to be included in the amount outstanding, but the amount so held shall be stated in a note to the table. Also set out in a note to the table a cross reference to any note in the financial statements containing information concerning the extent of obligations under leases on real property. See Paragraph 4.35(g) of Part IV.
2. Indebtedness evidenced by drafts, bills of exchange, bankers' acceptances or promissory notes may be set out in a single aggregate amount under an appropriate caption such as "Sundry Indebtedness".
3. State the respective priorities of the indebtedness shown in the table.
4. Give particulars of the amount, general description of and security for any substantial indebtedness proposed to be created or assumed by the issuer or its subsidiaries, other than obligations offered by the prospectus.
5. The information called for by this item should be stated succinctly but in adequate detail to furnish the investor with an accurate summary of the share and loan capital of the issuer.

Item 6. Name and Incorporation of Issuer:

State the full corporate name of the issuer and the address of its head office and

principal office. State the laws under which the issuer was incorporated and whether incorporated by letters patent or otherwise and the date thereof. If supplementary letters patent or similar authority for amendment or variation of the letters patent or other constating document has been issued, so state, giving the date thereof.

Instructions:

1. Particulars of any such documents need be set out only if materially relevant to the issue of the securities offered by the prospectus. See also Item 11.

2. If the issuer is not a corporation, give necessary relevant details of its form of organization and structure.

Item 7. Description of Business:

Briefly describe the business carried on and intended to be carried on by the issuer and its subsidiaries and the general development of such business within the five preceding years. If the business consists of the production or distribution of different kinds of products or the rendering of different kinds of services, indicate, in so far as practicable, the principal products or services.

Instructions:

1. The description shall not relate to the powers and objects specified in the incorporating instruments, but to the actual business carried on and intended to be carried on. Include the business of subsidiaries of the issuer only in so far as is necessary to understand the character and development of the business conducted by the combined enterprise.

2. In describing developments, information shall be given as to matters such as the following: the nature and results of any bankruptcy, receivership or similar proceedings with respect to the issuer or any of its subsidiaries; the nature and results of any other materially important reorganization of the issuer or any of its subsidiaries; the acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business; any materially important changes in the types of products produced or services rendered by the issuer and its subsidiaries; and any materially important changes in the mode of conducting the business of the issuer or its subsidiaries.

Item 8. Description of Property:

State briefly the location and general character of the principal plants, mines, oil and gas properties and other materially important physical properties of the issuer and its subsidiaries. If any such property is not freehold property or is held subject to any major encumbrance, so state and briefly describe the nature of the title or any such encumbrance, as the case may be.

Instructions: What is required is information essential to an investor's appraisal of the securities being issued. Such information should be furnished as will reasonably inform investors as to the suitability, adequacy, productive capacity and extent of

utilization of the facilities used in the enterprise. Detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required and should not be given.

Item 9. Incorporation Within Five Years—Promoters:

If the issuer was incorporated within the five years immediately preceding the date of the prospectus, furnish the following information.

(a) State the names of the promoters, the nature and amount of anything of value (including money, property, contracts, options or rights of any kind) received or to be received by each promoter directly or indirectly from the issuer, and the nature and amount of any assets, services or other consideration therefor received or to be received by the issuer.

(b) As to any assets acquired or to be acquired by the issuer from a promoter, state the amount at which acquired or to be acquired and the principle followed or to be followed in determining the amount. Identify the persons making the determination and state their relationship, if any, with the issuer or any promoter. If the assets were acquired by the promoter within two years prior to their transfer to the issuer, state the cost thereof to the promoter.

Item 10. Pending Legal Proceedings:

Briefly describe any material pending legal proceedings to which the issuer or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted and the principal parties thereto.

Instructions: If the business ordinarily results in actions for negligence or other claims, no such action or claim need be described unless it departs from the usual type of such actions.

Item 11. Issuance of Shares:

If shares are being offered, state the description or the designation of the class of shares and furnish the following information.

(a) Outline briefly (1) dividend rights; (2) voting rights; (3) liquidation or distribution rights; (4) pre-emptive rights; (5) conversion rights; (6) redemption or purchase for cancellation provisions; (7) sinking or purchase fund provisions; (8) liability to further calls or to assessment by the issuer; and provisions as to modification, amendment or variation of any such rights or provisions.

(b) Outline briefly any other material and relevant features of the provisions attaching to the shares, such as restrictions on distributions to shareholders and the like.

(c) If the rights of holders of such shares may be modified otherwise than in accordance with the provisions attaching to such shares, so state and explain briefly.

Instructions:

1. This item requires only a brief summary of the provisions which are pertinent from

an investment standpoint. Do not set out verbatim the provisions attaching to the shares; only a succinct resumé is required.

2. If the rights attaching to the shares being offered are materially limited or qualified by the rights of any other class of securities, or if any other class of securities (other than obligations covered in Item 12 hereof) ranks ahead of or *pari passu* with the shares being offered, include such information regarding such other securities as will enable investors to understand the rights attaching to the shares being offered. If any shares being offered are to be offered in exchange for other securities, an appropriate description of such other securities shall be given. No information need be given, however, as to any class of securities all of which will be redeemed or otherwise retired, provided appropriate steps to assure such redemption or retirement will be effected prior to or upon delivery by the issuer of the shares being offered.

3. The issuer may, at its option, set out verbatim the provisions attaching to the shares being offered in a schedule to the prospectus.

Item 12. Issuance of Obligations:

If obligations are being offered, give a brief summary of the principal attributes and characteristics of the indebtedness and the security therefor including without limiting the generality of the foregoing:

(a) provisions with respect to interest rate, maturity, redemption or other retirement, sinking fund and conversion rights;

(b) the nature and priority of any security for the obligations, together with a brief identification of the principal properties subject to lien;

(c) provisions permitting or restricting the issuance of additional securities, the incurring of additional indebtedness and other material negative covenants (including restrictions against payment of dividends under certain circumstances, restrictions against giving security on the assets of the issuer or its subsidiaries and the like) and provisions as to the release or substitution of assets securing the issue, the modification of the terms of the security and similar provisions; and

(d) the name of the trustee under any indenture securing the issue and the nature of any material relationship between the trustee and the issuer or any of its affiliates.

Instructions: Instructions 1 and 2 of Item 11 apply to this item *mutatis mutandis*. In addition, the issuer may, at its option, set out in a schedule to the prospectus a more complete statement of the attributes and characteristics of the securities being offered or a more complete summary of the principal material provisions of any indenture pursuant to which such securities are to be issued or secured.

Item 13. Issuance of Other Securities:

If securities other than shares or obligations are being offered, outline briefly the rights evidenced thereby. If subscription warrants or rights are being offered or issued, state the description and amount of securities covered thereby, the period during which, and the

price at which, the warrants or rights are exercisable, and the principal terms and conditions by which they may be exercised.

Instructions: The instructions to Item 11 apply to this item *mutatis mutandis.*

Item 14. Directors and Executive Officers:

List the names and home addresses in full of all directors and executive officers of the issuer. Indicate all positions and offices with the issuer held by each person named, and the principal occupations, within the five preceding years, of each director and executive officer.

Item 15. Remuneration of Directors and Executive Officers:

Furnish the following information, if possible in tabular form, as to all direct remuneration paid by the issuer and its subsidiaries during the issuer's last preceding fiscal year:

(a) the aggregate direct remuneration paid by the issuer and its subsidiaries to all directors and executive officers of the issuer for services in all capacities;

(b) the estimated cost to the issuer and its subsidiaries in the last preceding fiscal year of all pension or retirement benefits proposed to be paid in the aggregate under any existing plan in the event of retirement at normal retirement age, directly or indirectly, by the issuer or any of its subsidiaries to the persons mentioned in sub-paragraph (a), or, in the alternative, all pension or retirement benefits proposed to be paid, under any existing plan in the event of retirement at normal retirement age, directly or indirectly, by the issuer or any of its subsidiaries to each of the persons mentioned in sub-paragraph (a);

(c) all remuneration payments (other than payments required to be reported under sub-paragraphs (a) or (b) above) proposed to be made in the future, directly or indirectly, by the issuer or any of its subsidiaries pursuant to any existing plan or arrangement to each person mentioned in sub-paragraph (a), naming each such person.

Instructions:

1. This item applies to any person who was a director or executive officer of the issuer at any time during the period specified. However, information need not be given for any part of the period during which such person was not a director or executive officer of the issuer.

2. The information is to be given on an accrual basis, if practicable.

3. The term "plan" in sub-paragraphs (b) and (c) includes all plans, contracts, authorizations or arrangements, whether or not contained in any formal document or authorized by any resolution of the directors of the issuer or its subsidiaries.

4. Information need not be included as to payments to be made for, or benefits to be received from, group life or accident insurance, group hospitalization or similar group payments or benefits.

5. If it is impracticable to state the amount of remuneration payments proposed to be made, the aggregate amount set aside or accrued to date in respect of such payments should be stated, together with an explanation of the basis for future payments.

Item 16. Options to Purchase Securities:

Furnish the following information, if possible in tabular form, as to options to purchase securities from the issuer or any of its subsidiaries which are outstanding as of a specified date within 30 days prior to the date of the prospectus.

(a) Describe the options, stating the material provisions including the consideration received or to be received for such options by the grantor thereof and the market value of the securities called for on the granting date.

(b) State (i) the designation and number of the securities called for by such options; (ii) the purchase prices of the securities called for and the expiration dates of such options; and (iii) the market value of the securities called for by such options as of the latest practicable date.

(c) Furnish the information called for by sub-paragraph (b) above for all options held by all directors and executive officers as a group, without naming them.

Instructions:

1. The term "option" as used herein includes all options, warrants and rights other than those issued to security holders as such on a *pro rata* basis.

2. The extension of options shall be deemed the granting of options within the meaning of this item.

3. Where the total market value of the securities covered by all outstanding options as of the date specified in this item does not exceed $30,000 for all directors and executive officers as a group, this item need not be answered with respect to options held by such group.

Item 17. Principal Holders of Securities:

Furnish the following information as of a specified date within 90 days prior to the date of the prospectus in substantially the tabular form indicated:

(a) the voting securities (securities the holders of which are then entitled to vote for the election of directors) of the issuer owned of record or beneficially by each person who owns of record, or is known by the issuer to own beneficially, directly or indirectly, more than ten per cent of any class of such securities; show in column (3) whether the securities are owned both of record and beneficially, of record only, or beneficially only, and show in columns (4) and (5) the respective amounts and percentages owned in each such manner:

(1) Name and Address	(2) Designation of Class	(3) Type of Ownership	(4) Amount Owned	(5) Percentage of Class
.....	.....	.....	.....	.....

(b) each class of equity securities of the issuer or any of its parents or its subsidiaries, other than directors' qualifying shares, beneficially owned, directly or indirectly, by all directors and executive officers of the issuer, as a group, without naming them:

(1) Designation of class	(2) Amount beneficially owned	(3) Percentage of class
. . . . .	. . . . .	. . . . .

Instructions:

1. The percentages are to be calculated on the basis of the number or amount of outstanding securities. In any case where the number or amount owned by directors and executive officers as a group is less than one per cent of the class, the percentage of the class owned by them may be omitted.

2. If the equity securities are being offered in connection with, or pursuant to, a plan of acquisition, amalgamation or reorganization, indicate, as far as practicable, the respective shareholdings which will exist after giving effect to the consummation of the plan.

3. If any of the securities being offered are to be offered for the account of security holders, name each such security holder and state the number or amount of the securities owned by him, the number or amount to be offered for his account, and the number or amount to be owned after the offering.

4. If, to the knowledge of the issuer or any underwriter of the securities being offered, more than ten per cent of any class of voting securities of the issuer are held or are to be held subject to any voting trust or other similar agreement, state the designation of such securities, the number or amount held or to be held and the duration of the agreement. Give the names and addresses of the voting trustees and outline briefly their voting rights and other powers under the agreement.

5. If, to the knowledge of the issuer or any underwriter of the securities being offered, there is any direct or indirect relationship (through family and/or corporate structures or otherwise) between any of the above-mentioned persons who own more than ten per cent of any class of such securities, disclose, in so far as known, the material facts of such relationship.

Item 18. Interest of Management and Others in Material Transactions:

Describe briefly, and where practicable state the approximate amount of, any material interest, direct or indirect, of any of the following persons in any material transactions within the three preceding years, or in any material proposed transactions, to which the issuer or any of its subsidiaries was, or is to be, a party:

(i) any director or executive officer of the issuer;

(ii) any security holder named in answer to Item 17;

(iii) any associate of any of the foregoing persons.

Instructions:

1. Give a brief description of the material transaction. Include the name and home address of each person whose interest in any transaction is described and the nature of the relationship by reason of which such interest is required to be described.

2. As to any transaction involving the purchase or sale of assets by or to the issuer or any subsidiary, otherwise than in the ordinary course of business, state the cost of the assets to the purchaser and the cost thereof to the seller if acquired by the seller within two years prior to the transaction.

3. This item does not apply to any interest arising from the ownership of securities of the issuer where the security holder receives no extra or special benefit or advantage not shared on a *pro rata* basis by all other holders of the same class.

4. No information need be given in answer to this item as to any remuneration not received during the issuer's last preceding fiscal year or as to any remuneration or other transaction disclosed in response to Items 15 and 16.

5. Information should be included as to any material underwriting discounts and commissions upon the sale of securities by the issuer where any of the specified persons was or is to be an underwriter or is a controlling person, or member, of a firm which was or is to be an underwriter. Information need not be given concerning ordinary management fees paid by underwriters to a managing underwriter pursuant to an agreement among underwriters the parties to which do not include the issuer or its subsidiaries.

6. No information need be given in answer to this item as to any transaction or any interest therein where:

(i) the rates or charges involved in the transaction are fixed by law or determined by competitive bids;

(ii) the interest of the specified persons in the transaction is solely that of a director of another corporation which is a party to the transaction;

(iii) the transaction involves services as a bank depository of funds, transfer agent, registrar, trustee under a trust indenture or other similar services;

(iv) the interest of the specified persons, including all periodic instalments in the case of any lease or other agreement providing for periodic payments or instalments, does not exceed $30,000; or

(v) the transaction does not involve remuneration for services, directly or indirectly, and (A) the interest of the specified persons arose from the ownership in the aggregate of less than ten per cent of any class of equity securities of another corporation which is a party to the transaction, (B) the transaction is in the ordinary course of business of the issuer or its subsidiaries, and (C) the amount of such transaction or series of transactions is less than ten per cent of the total sales or purchases, as the case may be, of the issuer and its subsidiaries.

7. Information shall be furnished in answer to this item with respect to transactions not excluded above which involve remuneration, directly or indirectly, to any of the specified persons for services in any capacity unless the interest of such persons arises solely from the ownership in the aggregate of less than ten per cent of any class of

equity securities of another corporation furnishing the services to the issuer or its subsidiaries.

8. This item does not require the disclosure of any interest in any transaction unless such interest and transaction are material.

Item 19. Auditors, Transfer Agents and Registrars:

State the name and address of the auditor of the issuer. State the names of the issuer's transfer agents and registrars and the location (by municipalities) of the registers of transfers of each class of shares of the issuer. Where obligations are offered, state the location (by municipalities) of each register on which transfers of obligations of the issuer may be recorded.

Item 20. Material Contracts:

Give particulars of every material contract to which the issuer or its subsidiaries is a party and state a reasonable time and place at which any such contract or a copy thereof may be inspected during primary distribution of the securities being offered.

Instructions:

1. The term "material contract" for this purpose means any contract which can reasonably be regarded as material to the proposed investor in the securities being offered.

2. This item does not require disclosure of contracts entered into in the ordinary course of business of the issuer or its subsidiaries, as the case may be, or particulars of which are given elsewhere in the prospectus.

3. Particulars of contracts should include the dates of, parties to and general nature of the contracts, succinctly described.

4. Particulars of contracts need not be disclosed, or copies of such contracts made available for inspection, if the Commission determines that such disclosure or making available would impair the value of the contract and would not be necessary for the protection of investors.

Financial Statements

For requirements as to financial statements to be included in the prospectus, see Part IV of this Report.

Definitions of Certain Terms Used in Suggested Form of Prospectus

It will be necessary to define certain terms for use in the suggested form of prospectus, such as the following.

1. The term "executive officers" means the Chairman and any Vice-Chairman of the Board of Directors, the President, any Vice-President, the Secretary, the Treasurer, the General Manager and any other person performing functions similar to those of such officers and any other employee, not included in the foregoing, whose remuneration is one of the five highest paid by the company or its subsidiaries to such officers and other employees of the company.

2. The term "associate" used to indicate a relationship with any person, means (1) any corporation (other than a subsidiary of the issuer) of which such person is a director, executive officer or partner or is, directly or indirectly, the beneficial owner of ten per cent or more of any class of equity securities, (2) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar capacity, and (3) any relative or spouse of such person, or any relative of such spouse, who has the same home as such person or who is a director or executive officer of the issuer or any of its parents or subsidiaries.

3. The term "equity security" means any shares in the capital stock of a company or any security convertible, with or without consideration, into shares, or carrying any warrant or right to subscribe to or purchase such shares, or any such warrant or right.

4. The terms "parent" (holding company) and "subsidiary" shall have the meaning assigned to them by section 90 of The Corporations Act.

5. The term "promoter" means (1) any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer, and (2) any person who, in connection with the founding and organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, ten per cent or more of any class of securities of the issuer or ten per cent or more of the proceeds from the sale of any class of securities; provided, however, that a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organizing the enterprise.

6. The term "commissions" means all commissions or discounts paid or to be paid, directly or indirectly, by the issuer to an underwriter in respect of the sale of the securities to be offered.

7. The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking; but such term shall not include a person whose interest is limited to receiving a commission from an underwriter not in excess of the usual and customary distributor's or seller's commission.

Regulations Required To Supplement Suggested Form of Prospectus

Regulations will be required to be made under The Securities Act to aid in the preparation of prospectuses in the suggested form. Regulations should be made comparable, *mutatis mutandis*, to Rules 404 (c) and (d), 406 to 409 inclusive, 420 and 421 of Regulation C of the General Rules and Regulations under the Securities Act of 1933, which Rules are set out hereunder.

Rule 404 Preparation of Registration Statement

(*c*) Every registration statement shall include a cross reference sheet showing the location in the prospectus of the information required to be included in the prospectus in response to the items of the form. If any such item is inapplicable, or the answer thereto is in the negative and is omitted from the prospectus, a statement to that effect shall be made in the cross reference sheet.

(*d*) The facing page of every registration statement shall set forth the approximate date of proposed sale to the public.

Rule 406 Title of Securities

Wherever the title of securities is required to be stated there shall be given such information as will indicate the type and general character of the securities, including the following:

(*a*) In the case of shares, the par or stated value, if any; the rate of dividends, if fixed, and whether cumulative or noncumulative; a brief indication of the preference, if any; and if convertible, a statement to that effect.

(*b*) In the case of funded debt, the rate of interest; the date of maturity, or if the issue matures serially, a brief indication of the serial maturities, such as "maturing serially from 1950 to 1960"; if the payment of principal or interest is contingent, an appropriate indication of such contingency; a brief indication of the priority of the issue; and if convertible, a statement to that effect.

(*c*) In the case of any other kind of security, appropriate information of comparable character.

Rule 407 Interpretation of Requirements

Unless the context clearly shows otherwise—

(*a*) The forms require information only as to the registrant.

(*b*) Whenever any fixed period of time in the past is indicated, such period shall be computed from the date of filing the registration statement, as determined by sections 6 (*c*) and 8 (*a*) of the Act and the rules and regulations thereunder.

(*c*) Whenever words relate to the future, they have reference solely to present intention.

(*d*) Any words indicating the holder of a position or office include persons, by whatever titles designated, whose duties are those ordinarily performed by holders of such positions or offices.

Rule 408 Additional Information

In addition to the information expressly required to be included in a registration statement, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.

Rule 409 Information Unknown or Not Reasonably Available

Information required need be given only insofar as it is known or reasonably available to the registrant. If any required information is unknown and not reasonably available to the registrant, either because the obtaining thereof would involve unreasonable effort or expense, or because it rests peculiarly within the knowledge of another person not affiliated with the registrant, the information may be omitted, subject to the following conditions:

(*a*) The registrant shall give such information on the subject as it possesses or can acquire without unreasonable effort or expense, together with the sources thereof.

(*b*) The registrant shall include a statement either showing that unreasonable effort or expense would be involved or indicating the absence of any affiliation with the person within whose knowledge the information rests and stating the result of a request made to such person for the information.

Rule 420 Legibility of Prospectuses

The body of all printed prospectuses shall be in roman type at least as large as 10-point modern type. However, to the extent necessary for convenient presentation, financial statements and other statistical or tabular data and the notes thereto may be in roman type at least as large as 8-point modern type. All type shall be leaded at least 2 points.

Rule 421 Presentation of Information in Prospectuses

(*a*) The information required in a prospectus need not follow the order of the items or other requirements in the form. Such information shall not, however, be set forth in such fashion as to obscure any of the required information or any information necessary to keep the required information from being incomplete or misleading. Where an item requires information to be given in a prospectus in tabular form it shall be given in substantially the tabular form specified in the item.

(*b*) All information contained in a prospectus shall be set forth under appropriate captions or headings reasonably indicative of the principal subject matter set forth thereunder. Except as to financial statements and other tabular data, all information set forth in a prospectus shall be divided into reasonably short paragraphs or sections.

(*c*) Every prospectus shall include in the forepart thereof a reasonably detailed table of contents showing the subject matter of the various sections or subdivisions of the prospectus and the page number on which each such section or subdivision begins.

(*d*) All information required to be included in a prospectus shall be clearly understandable without the necessity of referring to the particular form or to the General Rules and Regulations. Except as to financial statements and information required in tabular form, the information set forth in a prospectus may be expressed in condensed or sum-

marized form. Financial statements included in a prospectus are to be set forth in comparative form if practicable, and shall include the notes thereto and the accountants' certificate.

APPENDIX D

Mutual Funds

A number of briefs on the subject of mutual funds were submitted to the Committee by associations and persons interested in this aspect of the securities industry. Representatives of the associations presenting the briefs also appeared before the Committee and put forward their views on certain aspects of the mutual funds business. During the hearings, particular stress was placed on the issue of dual licensing of salesmen to sell both life insurance and shares of mutual funds, with strong views expressed for and against such dual licensing.

Marketing of shares of mutual funds has for many years been subject to the prospectus requirements of section 40 of The Securities Act and salesmen selling such shares have been licensed under the provisions of that Act. We have recommended, in Paragraph 5.14, that The Securities Act should contain a separate section providing for the prospectus requirements of mutual funds since the provisions of section 40 dealing with investment companies are unsuitable to the particular characteristics of a mutual funds company. Although the sale of shares of mutual funds has been subject to The Securities Act, the mutual funds business has certain important characteristics similar to those of various Canadian institutions offering savings programs to individuals, for example, life insurance companies and trust companies. The Committee, therefore, considers that any study of the mutual funds business (including methods of distribution of shares) should encompass a comprehensive review of its relationship to such institutions. The Committee has concluded that it is not practical for it to undertake such a comprehensive and specialized study.

APPENDIX E

Information Circular

Item 1. Revocability of Proxy:

State whether or not the person giving the proxy has the power to revoke it and, if the laws of the jurisdiction in which the company is incorporated provide for limitations on the right to revoke proxies, give particulars of such limitations.

Item 2. Management Solicitation:

A statement should be made that the information circular is being distributed by management.

Item 3. Interest of Certain Persons in Matters to be Acted Upon:

Brief particulars should be given of any substantial interest, direct or indirect, by way of beneficial ownership of securities or otherwise, of each of the following persons in any matter to be acted upon, other than the election of directors or the appointment of auditors:

(i) each person who has been a director or executive officer (as defined in Appendix C of this Report) of the company at any time since the beginning of the last preceding fiscal year of the company;

(ii) each nominee for election as a director of the company; and

(iii) each associate (as defined in Appendix C) of the foregoing persons.

Item 4. Voting Shares and Principal Holders Thereof:

(i) Particulars should be given as to each class of shares of the company entitled to vote at the meeting, the number of such shares outstanding and the number of votes to which each such class is entitled.

(ii) Give the date as of which the record of shareholders entitled to vote at the meeting will be determined and, if the right to vote is not limited to shareholders of record as of a specified record date, indicate the conditions under which other shareholders may be entitled to vote.

(iii) If action is to be taken with respect to the election of directors and if the shareholders or any class of shareholders have cumulative or similar voting rights, include a statement of such rights and state briefly the conditions precedent to the exercise thereof.

(iv) If, to the knowledge of the directors or executive officers of the company, any person owns of record or owns beneficially, directly or indirectly, more than ten per cent of the outstanding voting shares of the company, name such person, state the approximate number of such shares owned of record but not beneficially and the approximate number owned beneficially, directly or indirectly, by such person and the percentage of outstanding voting shares of the company represented by the number of shares so owned in each such manner.

Item 5. (a) Nominees and Directors:

If action is to be taken with respect to the election of directors, the following information should be furnished in tabular form to the extent practicable with respect to each person nominated for election as a director and each other person whose term of office as a director will continue after the meeting:

(i) name each such person, state when his term of office or the term of office for which he is a nominee would expire and all other positions and offices with the company presently held by him and indicate which persons are nominees for election as directors at the meeting;

(ii) state the present principal occupation or employment of each such person, giving the name and principal business of any company or other organization in which such employment is carried on and furnish similar information as to all of the principal occupations or employments of such person within the five preceding years unless he is now a director and was elected to his present term of office by a vote of shareholders at a meeting, the notice of which was accompanied by an information circular;

(iii) if such person is or has previously been a director of the company, state the period or periods during which he has served as such;

(iv) state, as of the most recent practicable date, the approximate number of shares of each class of equity securities (as defined in Appendix C) of the company or of any of its parents or subsidiaries (other than directors' qualifying shares) beneficially owned, directly or indirectly, by each such person; and

(v) if more than ten per cent of any class of equity securities of the company or of any of its parents or subsidiaries are beneficially owned, directly or indirectly, by any such person and his associates, state the approximate number of each class of such shares beneficially owned by such associates, naming each associate whose shareholdings are substantial.

(b) If any nominee for election as a director is proposed to be elected pursuant to any arrangement or understanding between the nominee and any other person or persons (except the directors and executive officers of the company acting solely in such capacity), name such other person or persons and describe briefly such arrangement or understanding.

Item 6. Remuneration of Management and Others:

If action is to be taken at the meeting with respect to (i) the election of directors, (ii) any bonus, profit sharing or other remuneration plan, contract or arrangement in which any director, nominee for election as director, or executive officer of the issuer will participate, (iii) any company pension or retirement plan in which any such person will participate or, (iv) the granting or extension to any such person of any options, warrants or rights to purchase any shares, other than warrants or rights issued to shareholders, as such, on a pro rata basis, the following information should be furnished in tabular form:

(a) the aggregate amount of all direct remuneration paid by the company or its subsidiaries to all directors and executive officers of the company for services in all capacities;

(b) the estimated cost to the company and its subsidiaries in the last preceding fiscal year of all pension or retirement benefits proposed to be paid in the aggregate under any existing plan in the event of retirement at normal retirement age, directly or indirectly, by the company or any of its subsidiaries to the persons mentioned in sub-paragraph (a), or, in the alternative, all pension or retirement benefits proposed to be paid, under any existing plan in the event of retirement at normal retirement age, directly or indirectly, by the company or any of its subsidiaries to each of the persons mentioned in sub-paragraph (a);

(c) all remuneration payments, briefly described, (other than payments required to be reported under sub-paragraphs (a) or (b) above) proposed to be made in the future, directly or indirectly, by the company or any of its subsidiaries pursuant to any exisiting plan or arrangement to each person mentioned in sub-paragraph (a), naming each such person, provided that information need not be included as to payments to be made for, or benefits to be received from, group life or accident insurance, group hospitalization or similar group benefits or payments;

(d) all options to purchase securities from the company or any of its subsidiaries which were during the last preceding fiscal year granted to or exercised by all the persons mentioned in sub-paragraph (a) as a group, without naming them (particulars as to such options should include the description and amount or number of securities involved, option prices, expiry dates and other material provisions such as market values as of the date such options were granted); and

(e) state as to each of the following persons who is or has been at any time since the beginning of the last preceding fiscal year of the company indebted to the company or its subsidiaries (i) the largest aggregate amount of indebtedness outstanding at any time during such period; (ii) the nature of the indebtedness and of the transaction in which it was incurred; (iii) the amount thereof outstanding as of the latest practicable date; and (iv) the rate of interest paid or charged thereon:

(i) each director and each executive officer of the company;

(ii) each nominee for election as a director of the company; and

(iii) each associate of any such director, executive officer or nominee.

Instructions:

1. It is not necessary in the determination of the amount of indebtedness to include amounts due from the particular person for purchases subject to usual trade terms, for ordinary travel and expense advances and for other transactions in the ordinary course of business.

2. Such information need not be furnished for any person whose aggregate indebtedness did not exceed $10,000 at any time during the period specified.

3. Such information need not be furnished with respect to indebtedness owed by any

such person arising under any plan or arrangement whereby options, warrants or other rights have been given to such persons to acquire securities of the company if such plan or arrangement has been disclosed in any previous information circular.

Item 7. Interest of Management and Others in Material Transactions:

Describe briefly, and where practicable state the approximate amount of, any material interest, direct or indirect, of any of the following persons in any material transactions since the commencement of the company's last preceding fiscal year, or in any material proposed transactions to which the company or any of its subsidiaries was or is to be a party:

(i) any director or executive officer of the company;

(ii) any nominee for election as a director of the company;

(iii) any shareholder named in answer to Item 5 (a) (v); or

(iv) any associate of any of the foregoing persons.

Instructions:

1. Give a brief description of the material transaction. Include the name and home address of each person whose interest in any transaction is described and the nature of the relationship by reason of which such interest is required to be described.

2. As to any transaction involving the purchase or sale of assets by or to the company or any subsidiary, otherwise than in the ordinary course of business, state the cost of the assets to the purchaser and the cost thereof to the seller if acquired by the seller within two years prior to the transaction.

3. This item does not apply to any interest arising from the ownership of securities of the company where the security holder receives no extra or special benefit or advantage not shared on a *pro rata* basis by all other holders of the same class.

4. No information need be given in answer to this item as to any remuneration not received during the company's last preceding fiscal year or as to any remuneration or other transaction disclosed in response to Item 6.

5. Information should be included as to any material underwriting discounts and commissions upon the sale of securities by the company where any of the specified persons was or is to be an underwriter or is a controlling person, or member, of a firm which was or is to be an underwriter. Information need not be given concerning ordinary management fees paid by underwriters to a managing underwriter pursuant to an agreement among underwriters the parties to which do not include the company or its subsidiaries.

6. No information need be given in answer to this item as to any transaction or any interest therein where:

(i) the rate or charges involved in the transaction are fixed by law or determined by competitive bids;

(ii) the interest of the specified persons in the transaction is solely that of a director of another corporation which is a party to the transaction;

(iii) the transaction involves services as a bank depository of funds, transfer agent, registrar, trustee under a trust indenture or other similar services;

(iv) the interest of the specified persons, including all periodic instalments in the case of any lease or other agreement providing for periodic payments or instalments, does not exceed $30,000; or

(v) the transaction does not involve remuneration for services, directly or indirectly, and (A) the interest of the specified persons arose from the ownership in the aggregate of less than ten per cent of any class of equity securities of another corporation which is a party to the transaction, (B) the transaction is in the ordinary course of business of the company or its subsidiaries, and (C) the amount of such transaction or series of transactions is less than ten per cent of the total sales or purchases, as the case may be, of the company and its subsidiaries.

7. Information shall be furnished in answer to this item with respect to transactions not excluded above which involve remuneration, directly or indirectly, to any of the specified persons for services in any capacity unless the interest of such persons arises solely from the ownership in the aggregate of less than ten per cent of any class of equity securities of another corporation furnishing the services to the company or its subsidiaries.

8. This item does not require the disclosure of any interest in any transaction unless such interest and transaction are material.

Item 8. Appointment of Auditors:

If action is to be taken with respect to the appointment of auditors, name such auditors.

Item 9. Particulars of Matters to be Acted Upon:

If action is to be taken on any matter to be submitted to the meeting of shareholders other than those specified in the foregoing and other than the approval of financial statements, the substance of each such matter (or related groups of matters) should be briefly described in sufficient detail to permit shareholders to form a reasoned judgment concerning any such matter. Such matters would include alterations of share capital, charter amendments, property acquisitions, amalgamations, mergers, reorganizations or similar transactions. If any such matter is one which is not required to be submitted to a vote of shareholders, the reasons for submitting it to shareholders should be given and a statement should be made as to what action is intended to be taken by management in the event of a negative vote by the shareholders.

APPENDIX F

SECURITIES EXCHANGE ACT OF 1934

Extract From General Rules and Regulations

Regulation 14. Solicitation of Proxies

Rule 14a-4. Requirements as to Proxy.

(a) The form of proxy (1) shall indicate in bold-face type whether or not the proxy is solicited on behalf of the management, (2) shall provide a specifically designated blank space for dating the proxy and (3) shall identify clearly and impartially each matter or group of related matters intended to be acted upon, whether proposed by the management or by security holders. No reference need be made, however, to proposals as to which discretionary authority is conferred pursuant to paragraph (c).

(b) Means shall be provided in the form of proxy whereby the person solicited is afforded an opportunity to specify by ballot a choice between approval or disapproval of each matter or group of related matters referred to therein as intended to be acted upon, other than elections to office. A proxy may confer discretionary authority with respect to matters as to which a choice is not so specified provided the form of proxy states in bold-face type how it is intended to vote the shares represented by the proxy in each such case.

(c) A proxy may confer discretionary authority with respect to other matters which may come before the meeting, provided the persons on whose behalf the solicitation is made are not aware a reasonable time prior to the time the solicitation is made that any such other matters are to be presented for action at the meeting and provided further that a specific statement to that effect is made in the proxy statement or in the form of proxy. A proxy may also confer discretionary authority with respect to any proposal omitted from the proxy statement and form of proxy pursuant to paragraph (c) of Rule 14a-8.

(d) No proxy shall confer authority (1) to vote for the election of any person to any office for which a bona fide nominee is not named in the proxy statement, or (2) to vote at any annual meeting other than the next annual meeting (or any adjournment thereof) to be held after the date on which the proxy statement and form of proxy are first sent or given to security holders.

(e) The proxy statement or form of proxy shall provide, subject to reasonable specified conditions, that the shares represented by the proxy will be voted and that where the person solicited specifies by means of a ballot provided pursuant to paragraph (b) a choice with respect to any matter to be acted upon, the shares will be voted in accordance with the specifications so made.

Rule 14a-5. Presentation of Information in Proxy Statement.

(a) The information included in the proxy statement shall be clearly presented and the statements made shall be divided into groups according to subject matter and the

various groups of statements shall be preceded by appropriate headings. The order of items and sub-items in the schedule need not be followed. Where practicable and appropriate, the information shall be presented in tabular form. All amounts shall be stated in figures. Information required by more than one applicable item need not be repeated. No statement need be made in response to any item or sub-item which is inapplicable.

(b) Any information required to be included in the proxy statement as to terms of securities or other subject matter which from a standpoint of practical necessity must be determined in the future may be stated in terms of present knowledge and intention. To the extent practicable, the authority to be conferred concerning each such matter shall be confined within limits reasonably related to the need for discretionary authority. Subject to the foregoing, information which is not known to the persons on whose behalf the solicitation is to be made and which it is not reasonably within the power of such persons to ascertain or procure may be omitted, if a brief statement of the circumstances rendering such information unavailable is made.

(c) There may be omitted from the proxy statement any information contained in any other proxy soliciting material which has been furnished to each person solicited in connection with the same meeting or subject matter if a clear reference is made to the particular document containing such information.

(d) All printed proxy statements shall be set in roman type at least as large as 10-point modern type except that to the extent necessary for convenient presentation financial statements and other statistical or tabular matter may be set in roman type at least as large as 8-point modern type. All type shall be leaded at least 2 points.

SCHEDULE 14B—INFORMATION TO BE INCLUDED IN STATEMENTS FILED BY OR ON BEHALF OF A PARTICIPANT (OTHER THAN THE ISSUER) IN A PROXY SOLICITATION PURSUANT TO RULE 14a-11 (c).

Answer every item. If an item is inapplicable or the answer is in the negative, so state. The information called for by items 2 (a) and 3 (a) or a fair summary thereof is required to be included in all preliminary soliciting material by Rule 14a-11 (d).

Item 1. Issuer. State the name and address of the issuer.

Item 2. Identity and Background.

(a) State the following:

(1) Your name and business address.

(2) Your present principal occupation or employment and the name, principal business and address of any corporation or other organization in which such employment is carried on.

(b) State the following:

(1) Your residence address.

(2) Information as to all material occupations, positions, offices or employments during the last ten years, giving starting and ending dates of each and the name, principal business and address of any business corporation or other business organization in which each such occupation, position, office or employment was carried on.

(c) State whether or not you are or have been a participant in any other proxy contest involving this or other issuers within the past ten years. If so, identify the principals, the subject matter and your relationship to the parties and the outcome.

(d) State whether or not, during the past ten years, you have been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors) and, if so, give dates, nature of conviction, name and location of court, and penalty imposed or other disposition of the case. A negative answer to this sub-item need not be included in the proxy statement or other proxy soliciting material.

Item 3. Interests in Securities of the Issuer.

(a) State the amount of each class of securities of the issuer which you own beneficially, directly or indirectly.

(b) State the amount of each class of securities of the issuer which you own of record but not beneficially.

(c) State with respect to the securities specified in (a) and (b) the amounts acquired within the past two years, the dates of acquisition and the amounts acquired on each date.

(d) If any part of the purchase price or market value of any of the shares specified in paragraph (c) is represented by funds borrowed or otherwise obtained for the purpose of acquiring or holding such securities, so state and indicate the amount of the indebtedness as of the latest practicable date. If such funds were borrowed or obtained otherwise then pursuant to a margin account or bank loan in the regular course of business of a bank, broker or dealer, briefly describe the transaction, and state the names of the parties.

(e) State whether or not you are a party to any contracts, arrangements or understandings with any person with respect to any securities of the issuer, including but not limited to joint ventures, loan or option arrangements, puts or calls, guarantees against loss or guarantees of profits, division of losses or profits, or the giving or withholding of proxies. If so, name the persons with whom such contracts, arrangements, or understandings exist and give the details thereof.

(f) State the amount of securities of the issuer owned beneficially, directly or indirectly, by each of your associates and the name and address of each such associate.

(g) State the amount of each class of securities of any parent or subsidiary of the issuer which you own beneficially, directly or indirectly.

Item 4. Further Matters.

(a) Describe the time and circumstances under which you became a participant in the

solicitation and state the nature and extent of your activities or proposed activities as a participant.

(b) Furnish for yourself and your associates the information required by item 7 (f) of Schedule 14A.

(c) State whether or not you or any of your associates have any arrangement or understanding with any person—

(1) with respect to any future employment by the issuer or its affiliates; or

(2) with respect to any future transactions to which the issuer or any of its affiliates will or may be a party.

If so, describe such arrangement or understanding and state the names of the parties thereto.

Item 5. Signature.

The statement shall be dated and signed in the following manner:

I certify that the statements made in this statement are true, complete, and correct, to the best of my knowledge and belief.

(Date)

(Signature of participant or authorized representative)

Instruction. If the statement is signed on behalf of a participant by the latter's authorized representative, evidence of the representative's authority to sign on behalf of such participant shall be filed with the statement.